

88-1299

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD R. SYRE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

RICHARD R. SYRE, *pro se*

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QUESTIONS PRESENTED FOR REVIEW

1. Were the Petitioner's rights to confrontation and equal protection under the Sixth and Fourteenth Amendments violated by the Commonwealth of Pennsylvania (a) in the use of covert electronic surveillance using an uncontrolled and un-directed consenting agent, (b) in the nondisclosure of electronic tape recordings, and (c) in the formulation and prosecution of criminal charges based solely on a limited selection (one) of taped conversations between the consenting agent and the Petitioner?

2. Were the State Court proceedings against Petitioner biased in their totality violating the Due Process Clause of the Fifth and Fourteenth Amendments?

3. Was the Pennsylvania Wiretapping and Electronic Surveillance Act (18 Pa.C.S.A. Sections 5701-5726) applied to Petitioner unconstitutionally?

4. Was the Petitioner's Sixth Amendment right to an impartial jury as it applies to the States through the Fourteenth Amendment violated by the Commonwealth of Pennsylvania (a) in the failure or refusal to investigate the consenting covert agent's complaint against the Petitioner, (b) in official misconduct in the investigation of official interference in jury deliberations, and (c) in a court official's private conversation(s) with sequestered jurors about the evidence?

PARTIES TO THE PROCEEDINGS

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In accord with United States Supreme Court Rule 28.4(c) Petitioner states that 28 U.S.C. §2403(b) may be applicable. Copies of this Petition for Certiorari have been served upon the parties listed above on the date and in the manner noted on the attached Affidavit of Service.

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STATE COURT RULINGS SUBJECT TO REVIEW

1. Pennsylvania Supreme Court Opinion: No. 26 E.D. Appeal Docket, 1984, 489 A.2d 1340 (*Pa.*, 1985) Dated: April 3, 1985 (Appendix A).

(Reversing and Remanding Pennsylvania Superior Court, No. 2248, Philadelphia, 1982, 469 A.2d 1059 (*Pa. Super.*, 1983) Dated: September 2, 1983) Appendix B)

2. Pennsylvania Supreme Court Opinion: No. 1453 E.D. Allocatur Docket 1985 Dated: November 10, 1986 Appendix C

(Reversing and reinstating sentence Pennsylvania Superior Court, No. 2248, Philadelphia, 1982, 501 A.2d 671 (*Pa. Super.*, 1985) Dated: November 29, 1985 Appendix D)

JURISDICTIONAL STATEMENT

1. Decisions Appealed

Appeal is taken from the final *per curiam* order of the Supreme Court of the Commonwealth of Pennsylvania DATED: NOVEMBER 10, 1986 (Appendix C) and interim decision of said court dated April 3, 1983 (Appendix A).

2. Jurisdiction of the United States Supreme Court

Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. 1257 (3), 28 U.S.C. 2102, 28 U.S.C. 2104, Supreme Court Rules 39 and 46.3, and such other supervisory powers possessed by the United States Supreme Court.

VERBATIM CONSTITUTIONAL PROVISIONS AND STATUTES

1. Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice but in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

2. Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory pro-

cess for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Exceptions to Prohibition on Interception and Disclosure of Communications Pennsylvania Wiretapping and Electronic Surveillance Act, 18 Pa.C.S. 5704

It shall not be unlawful under this chapter for: (2) Any investigative or law enforcement officer or any person acting at the direction or request of an investigative or law enforcement officer to intercept a wire or oral communication involving suspected criminal activities where:

(i) such officer or person is a party to the communication; or

(ii) one of the parties to the communication has given prior consent to such interception. However, no interception under this paragraph shall be made unless the Attorney General or a deputy attorney general designated in writing by the Attorney General, or the district attorney, or an assistant district attorney designated in writing by the district attorney, of the county wherein the interception is to be made, has reviewed the facts and is satisfied that the consent is voluntary and has given prior approval for the interception; however such interception shall be subject to the recording and record keeping requirements of section 5714(a) (relating to recording of intercepted communications) and that the Attorney General, deputy attorney general, district attorney or assistant district attorney authorizing the in-

terception shall be the custodian of recorded evidence obtained therefrom.

5. Privileged Communications Pennsylvania Wiretapping and Electronic Surveillance Act, 18 Pa.C.S. 5711

No otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

6. Action For Removal From Office Or Employment Pennsylvania Wiretapping and Electronic Surveillance Act, 18 Pa.C.S. 5726

(a) Cause of action.— Any aggrieved person shall have the right to bring an action in Commonwealth Court against any investigative or law enforcement officer, public official or public employee seeking the officer's official's or employee's removal from office or employment on the grounds that the officer, official or employee has intentionally violated the provisions of this chapter. If the court shall conclude that such officer, official or employee has in fact intentionally violated the provisions of this chapter, the court shall order the dismissal or removal from office of said, official or employee.

(b) Defense. — It is a defense to any action brought pursuant to subsection (a) that the actor acted in good faith reliance on a court order or the provisions of this chapter.

STATEMENT OF THE CASE

This case involves the prosecution of Richard R. Syre, Petitioner, by the Philadelphia District Attorney on evidence secured through electronic surveillance by placing a concealed sound recording device on consenting agent, Ezekiel Gibbs. There are two parallel narratives in this case: (1) the treatment Gibbs received from Syre for which Syre was prosecuted; and, (2) the treatment Gibbs and Syre received from the District Attorney.

1. Petitioner's Treatment Of Consenting Agent, Gibbs

Syre's involvement with Gibbs arose out of Syre's employment as legal counsel to Teamsters Local 115. Gibbs was a member of a bargaining unit of cab drivers employed by Penn Radio Cab, Inc., in Philadelphia, Pennsylvania, operated by Morris Slotsky and Jack Gellar. Attorney Richard Sprague and Associates were legal counsel to Penn Cab.

In June of 1980 a strike occurred. Gibbs crossed a picketline and was assaulted by five fellow employees. He filed criminal charges. Syre, as legal counsel, represented the five accused assailants.

While Gibbs' assault charges were pending the bitter strike against Penn Cab was settled. Penn Cab and its attorneys sat down with Local 115 to negotiate a collective bargaining agreement protecting Gibbs and his fellow workers. After the strike ended Gibbs met with Union Business Agent Joe Yeoman and discussed payment of medical expenses. Yeoman committed the Union to pay Gibbs \$1600.00 for medical expenses and turned the details of completing the agreement over to Teamsters legal counsel which included Syre.

While documents were being prepared Gibbs approached Syre and pleaded for prompt payment. He was paid \$400.00 by Syre by union check and signed a written commitment in principle to the settlement of the civil liabilities on or about August 23, 1980. (Appendix E) On September 22, 1980, Syre had intentions of completing the settlement agreement in court after Gibbs had presented his request to the judge to withdraw criminal assault charges, a procedure not forbidden under Pennsylvania Rules of Criminal Procedure, Rules 145 and 314.

Gibbs did not get an opportunity to appear before the judge. On September 22, 1980, he turned yet again to Syre for help professing an urgent need for final payment, an express desire to leave town, and emphatic expressions of his own independent desire to withdraw criminal charges. Syre hesitated about com-

pleting the agreement and, when pressed, promised Gibbs another properly documented part payment. (Appendix E) Syre told Gibbs that if he desired to withdraw criminal charges he should discuss it with the District Attorney but warned him that the District Attorney would be very unreceptive to such a request and Gibbs would have to be forceful in making it. Syre emphatically stated that if Gibbs desired to proceed with the prosecution that was his choice.

Gibbs went in to talk to the Assistant District Attorney, Charles Klein, standing in the court room. By prearrangement Gibbs met with Syre later. Gibbs claimed he had been threatened with prosecution for wanting to drop charges. Syre discussed with Gibbs his jeopardy in being prosecuted for perjury if forced to testify explaining to Gibbs that one of the accused, Leonard Jones, was provably not involved in the assault. Noting a conflict in interest Syre declined Gibbs' request for legal representation. Instead Syre referred Gibbs to an attorney of his own choice.

After the September 22, 1980, conversation with Gibbs Syre reported the events to the union. Syre advised the union to insist upon Gibbs' presence at the union where Gibbs would document fully his understanding of his contract before attending union officers.

Gibbs contacted Syre again on, at least, one other occasion. On September 26, 1980, Syre repeated his advise to Gibbs to get independent counsel to help him decide what to do about the criminal assault charges. Being pressed for some kind of additional payment Syre again told Gibbs the payment was for civil liabilities and he should do whatever he wanted to do about withdrawing the criminal charges.

On October 2, 1980, Gibbs called the law office of Joel Rome whose name he received from a union member. Rome, who had been asked by Syre to represent Leonard Jones (appearance entered on Aug. 21, 1980), called Syre to ask why Syre was referring Gibbs himself to Rome. Syre told Rome he did not

refer Gibbs to Rome but to an attorney of his own choice to explain to him his contract with the Teamster. Nevertheless, Syre urged Rome to meet with Gibbs to explain the agreement.

On October 7, 1980, Gibbs met with Rome and Rome emphatically told Gibbs that the payment was not for dropping the criminal charges.

On October 29, 1980, Gibbs came to the union hall, received payment, and signed a final agreement in which he acknowledged before witnesses that he was under no obligation to withdraw criminal assault charges. (Appendix F)

On December 4, 1981, Syre was convicted on one count of tampering with a witness by offering him pecuniary gain to withhold testimony or absent himself from a proceeding. He was sentenced to two years probation, costs of \$50, and one year service to Community Legal Services. Syre appealed and was suspended from the practice of law.

2. The Philadelphia District Attorney's Treatment Of Gibbs

The Philadelphia District Attorney's involvement with Gibbs arose out of his use of Gibbs as a consenting agent in secret electronic surveillance of Syre and officers of Teamsters Local No. 115.¹ Assistant District Attorney (A.D.A.) George Parry directly supervised the surveillance and prosecuted Syre.

Although Gibbs had been cooperating with Penn Cab under the direction of attorney Richard Sprague in proceedings to enjoin strike activity Sprague disclaims any involvement "what-

¹ The Philadelphia District Attorney is referred to on occasion as the Prosecutor. The term is used without an attempt to distinguish between the collective and divisive use of the term. The circumstances involve conspiratorial activity in a secret investigation so that identities of specific actors may be uncertain while the action itself is certified in the record. The word Prosecutor, thus, may refer to individuals manipulating Gibbs who are conspiring with but not necessarily employed by the Philadelphia District Attorney.

soever" in the use of Gibbs as a covert agent against the Teamsters other than the making of a phone call to the District Attorney upon his client's request. Apparently, with one phone call Sprague was able to induce the District Attorney to launch a major covert investigation against Local No. 115. In a covert investigation of uncertain extent Gibbs made recordings of Syre, Yoeman, Rome and perhaps others. Other Penn Cab employees made other recordings of Teamsters the nature and extent of which is not fully known to Syre but certified in undisclosed official records.

The District Attorney claims Gibbs was first employed as a consenting covert agent on September 22, 1980, to record the conversations summarized above. (Appendix G and H) The nature of Gibbs' complaint about witness tampering is to this date not clear but from the record of trial it could have consisted of nothing more than Gibbs' statement that he was told once by Yeoman and, on a separate occasion, once by Syre that the civil payment was for both the civil settlement and dropping the criminal charges. Insofar as the electronic surveillance record disclosed in Syre's prosecution is deemed complete no such remarks were ever recorded and no effort was ever made by Gibbs, acting under the Prosecutor's direction (18 Pa.C.S. 5704 (2)), to confront any ambiguities he perceived in his contractual dealings with the Teamsters.

Morris Slotsky's affidavit of October 20, 1980, submitted in the Prosecutor's investigation shows that "[o]n Sept. 18, 1980, Waymen (sic Waymon) Clark, one of my employees came into my office to report he had overheard that Gibbs was going to get \$1200.00 to drop the charges, so he can get his teeth fixed. When I heard this news, I called Mr. Sprague's office, because I was curious about the offering of money to drop charges." This was not news to Slotsky. There was no secret about the union's settlement with Gibbs and in labor negotiations Slotsky was vigorously urged, as he acknowledges, to use his best efforts to get the criminal charges arising out of the strike dropped. Both Slotsky and Sprague were acutely aware of the weaknesses in the

Prosecutor's broad and exaggerated charges that included Gibbs' accusations against fellow cab driver Leonard Jones who had a perfect alibi.²

The four assailants who were prosecuted were acquitted and charges against Jones were dismissed.

At best, from the Prosecutor's point of view, the record shows a reckless and near criminal nonfeasance in the initiation of covert electronic surveillance. The record evidence, as disclosed but certifiably not complete, does not diminish the powerful inference that Gibbs was employed in a purposeful and malicious plan to *provoke* harm to himself by the Teamsters and not to *investigate* any Teamster mistreatment of Gibbs.

The narrative as presented in section (1) above is based upon information that was secretly recorded by the Philadelphia District Attorney. Unless that interpretation of the secretly recorded data is preposterously inaccurate it constitutes information that reasonably informed the Prosecutor in his judgments in directing the covert surveillance subsequent to September 22, 1980.

On September 26, 1980, the Prosecutor recorded Gibbs' conversation with Syre the contents of which have been noted

² Both the union and the company as the employer had a personal interest in the well being of all the participants. In labor negotiations, requiring good faith negotiation subject to federal enforcement, all manner of company business is discussed in exhausting and brutally frank detail. The record clearly shows that Leonard Jones was not involved in the attack on Gibbs. He was in South Carolina, the fifth assailant, Levon Moses, admitted his participation in the picketline fight, and the other four assailants acknowledged the absence of Leonard Jones. As secretly recorded (and therefore a circumstance provably known by the Prosecutor) upon being told by Gibbs that Gibbs himself was threatened with prosecution, Syre confronted Gibbs with the information about Jones' non-participation in the fight. Gibbs, in response, claimed to be more certain of Jones' presence than anything else about the assault. (Appendix H, p. A-74)

above. (Appendix I) At some point in time a defect was introduced into the recording to nearly obliterate Gibbs' voice. Detective Harris blamed the flaw on poor training.

Notwithstanding strong inferences of intentional destruction of evidence, the Prosecutor never disclosed this tape recording until the actual trial started. The Prosecutor succeeded in suppressing this evidence, of which he was the proponent, by delivering it to the judge the day of the suppression hearing as if the defendant were moving for its suppression when, in fact, the defendant had no knowledge of the tape.

To accomplish this "legal" maneuver the Prosecutor necessarily had to provide false and incomplete notice of interception required at the time of the preliminary hearing on July 23, 1981. There is a strong inference to be drawn that the Prosecutor specifically intended to provide false information in the discovery process. In any case, the defendant, Syre, was greatly prejudiced by non-disclosure of this "exculpatory" evidence.³

On October 2, 1980, Gibbs called Joel Rome and Joe Yeoman. A. D. A. George Parry monitored and recorded the phone calls. They were never disclosed. Parry on May 29, 1981, during the trial of the four assailants, testified about the making of the recordings. No colorable criminal activity was in-

³ The term exculpatory is placed in ironic quotes because there was never any crime charged from which to be exculpated. Payment of civil damages even as a *quid pro quo* for withdrawal of criminal assault charges is not a crime in Pennsylvania. *Castner v. Cornell*, 1 Luz. L.O. 58 (Common Pleas, Luzerne Co., (1865); *Sharp v. Philadelphia Warehouse Co.*, 10 F. 379 (Cir. Ct, E.D. Pa., 1881); Pennsylvania Supreme Court Rules of Criminal Procedure Rule 145, 314. The disposition of the criminal case is a matter of judicial discretion guided by Rule. Only Justice Zappala addressed this issue in dissent. *Commonwealth v. Syre*, 489 A.2d 1340, 1346 - 1349 (Pa., 1985) (Appendix A, pp. A-11 - A-17) Justice Zappala noted there was no proof of a *mens rea*. But *mens rea* is not even in issue if there is no *actus reus*.

'dicated. Parry explained to Gibbs, according to Parry's testimony, that the targets of the surveillance were wary of being recorded and this was the reason why Gibbs was not producing evidence of criminal conduct. (Appendix J)

On October 2, 1980, Parry's knowledge of Gibbs' contract with the Teamsters was, according to the Prosecutor's claims, limited to the recording of September 22, 1980, (Appendix G and H) and Gibbs' subsequent statement of October 1, 1980, wherein Gibbs' stated: (1) Business Agent Joe Yeoman agreed on behalf of the union to pay \$1600 damages with no mention of criminal charges. (2) Gibbs sought out Syre during a court appearance (August 21, 1980) and lied to Syre about his desperate need for payment. (3) Syre showed Gibbs a draft of the final contract (Appendix F) which, Gibbs told the District Attorney, stated that Gibbs would receive payment when the charges were dropped. (4) Syre offered to see if the union would provide immediate assistance to Gibbs. (5) Syre later paid Gibbs \$400.00 in a check and secured Gibbs' signature on a "short letter" (Appendix E) which was subsequently "stolen".

Neither on October 2, 1980, nor at any other time, including Gibbs' trial testimony, did Gibbs claim that he was bribed, asked by anyone to drop criminal charges, asked to change his testimony, or asked to evade a subpoena. Nowhere in the disclosed electronic surveillance is there an indication that Gibbs was ever instructed to confront any of these issues. Rather, the record clearly discloses that Gibbs was encouraged to continue to feign a lack of understanding of the restitution agreement and profess a willingness to withdraw criminal charges against his fellow Penn Cab employees.⁴

⁴ The appendix on review in this case would require the entire record, for what is *not* in the record has more significance than what is in the record. Non-confrontation and concealment was the essence of the prosecution. (e.g. Transcript, Motion to Suppress, Nov. 25 & 30, 1981, pages 162 - 166, 297)

The Prosecutor continued to use Gibbs in the dangerous activity of covert surveillance. But the Prosecutor never sat down with Gibbs to have Gibbs explain the nature and extent of his involvement with the Teamsters.

There is a strong inference that the Prosecutor knew there was nothing to investigate. In any case, he was careless.

On October 7, 1980, Gibbs visited the office of Joel Rome who had spoken to Syre about the visit after the October 2, 1980, telephone call from Gibbs. Gibbs was "wired". The tape recording was never produced. Syre was not allowed to call Rome as a witness. Despite the fact that Rome consented to the disclosure of his tape recordings Syre was not allowed to review them. At trial Syre was not allowed to question Gibbs about his conversations with Rome. (Transcript, Dec. 2, 1981, pages 2.93 - 2.104)

On October 9, 1980, the Prosecutor placed Gibbs in "protective custody" eventually paying Gibbs \$822.85 in travel and cash expenses.⁵ Syre's jury was subsequently informed of the need for "protective custody."

On October 29, 1980, Gibbs visited the union hall equipped by the District Attorney to record the conversation. Present were Joe Yeoman, James Smith, and Syre. (Appendix K) The settlement agreement (Appendix F), specifically noting that Gibbs was under no obligation to withdraw criminal charges, was finalized and Gibbs was paid \$1200.00 by union check.⁶ The

⁵ \$450 in non-payroll reimbursements to Gibbs from Penn Radio Cab, Inc. are also documented in the record making a total of \$1272.85 known to have been paid to Gibbs during his cooperation in surveillance of Teamsters Local No. 115. Gibbs grossed \$2072.85 in his anti-union activity for Penn Cab and working as a consenting agent for the D.A. against the union.

⁶ On September 22, 1980, Syre had Gibbs sign the preliminary document (Appendix E) noting \$800.00 owing on the contract but told Gibbs, who had originally discussed a \$2000.00 payment with Yeoman as he noted in his October 1, 1980, statement to the D.A., that he

Prosecutor, before the jury and in appeals, characterized the written agreement as a "cover-up" and the Pennsylvania Supreme Court called it a "subterfuge designed to conceal" the witness tampering of September 22, 1980.⁷ *Commonwealth v. Syre*, 489 A.2d 1340, 1346 (Pa., 1985)⁸ Judge Kubacki suppressed the tape recordings as irrelevant, crippling the defense's ability to cross-examine Gibbs. (Transcript, Motion to Suppress, Nov. 30, 1981, pages 296 - 297) They were never transcribed but Parry was allowed to play them to "impeach" yeoman who could not remember that he told Gibbs he wanted to discuss a "legal" matter with him. (Appendix K, p. A-90)

During October and November, 1980, more tapes were made by Gibbs and other Penn Cab employees of union activity. None of them have been disclosed.

On December 4, 1980, two District Attorney detectives visited Syre in his home. They were "wired". Syre willingly talked to them. They gave Syre the following misinformation: That Gibbs had formally accused Syre and the Teamsters of paying

would see what he could do to get him more money for the civil liabilities. Yeoman testified the \$1200.00, payment instead of \$800.00, was a "bookkeeping" mistake.

⁷ No charges of conspiracy against Syre or the Teamsters were made. No other Teamsters were charged. Over objection Parry introduced the Teamster "bribe conspiracy" as "background information". (Transcript, Dec. 1, 1981, pages 124 - 126) On the other hand, Parry's objections to the Rome tapes, which *materially* contradicted the supposition of a conspiracy, were sustained as irrelevant. The Rome tapes were the Prosecutor's *own* evidence and a product of his own contrivance.

⁸ As to September 22, 1980, Justice Flaherty noted, "[i]n short, the conversations reveal that Gibbs was to be paid the sum of \$1600.00, *ostensibly* [emphasis in original] for a release of civil liability, but with the threat that the full amount of the funds would not be paid until Gibbs had 'cooperated' by doing whatever was necessary to obtain dismissal of the criminal charges." 489 A.2d at 1342

him to testify falsely⁹ and that they were unaware of any settlement agreement between Gibbs and the Teamsters. As they interviewed Syre the detectives solicited denials from Syre as to general, compound statements accusing Syre and the Teamsters of bribing Gibbs. At trial Parry presented these recorded general denials as false denials to specific fact inquiries in the manner in which he paraphrased the questions before the jury.

On December 19, 1980, Penn Cab Treasure, Jack Gellar, visited the union hall apparently in connection with the labor dispute. He informed the union that his partner, Morris Slot-sky, along with Richard Sprague were paying Gibbs to frame the union by means of an undercover investigation conducted by the Philadelphia District Attorney. To back up his allegations Gellar presented a series of non payroll checks made out to Gibbs. The records showed an \$8000.00 payment to Sprague and a \$125.00 payment to Gibbs on September 23, 1980, among other special payments that generally corresponded to Gibbs' appearance dates in court proceedings against the union. (See note 5) Syre was not allowed to examine Gellar about the incident or introduce Gellar's sworn affidavit of December 19, 1980, into evidence at trial.¹⁰ (Transcript, Dec. 3, 1981, pages 3.39 - 3.45)

⁹ Gibbs never testified he was asked to testify falsely. Nor did he testify that anything Syre told him to say about the assault incident to prosecutors who had threatened him with prosecution was untruthful. Gibbs could not do this without the risk of committing perjury because Syre's remarks to Gibbs were in conformity with Gibbs' preliminary hearing testimony given on July 17, 1980, in which Syre represented the accused assailants. Judge Kubacki would not allow Syre to testify fully about the discrepancies in Gibbs' account of the assault.

¹⁰ The affidavit was given to the Prosecutor at the time of Syre's arrest. He interviewed Gellar but did not question the principals, Slot-sky, who disclosed to Gellar the existence of the covert investigation or, Sprague, who allegedly was plotting against Teamsters Local No. 115 as Slotsky's attorney.

A warrant was issued for Syre's arrest on February 17, 1981. On July 23, 1981, a preliminary hearing was conducted before Judge Margiotti. On this day the Prosecutor disclosed the tapes of September 22nd, and December 4th. The tape upon which the entire prosecution was based, Appendix H in which Syre discussed Gibbs' possible perjury prosecution, was not considered by Judge Margiotti. The Prosecutor's presentation of already barely audible tapes over loudspeakers made them incomprehensible crippling the defense's ability to cross-examine Gibbs. Judge Margiotti refused to consider the tape containing Syre's legal advise to Gibbs.¹¹ Thus, probable cause was based upon Gibbs' vague statements about being paid to change his testimony and evade a subpoena.¹²

¹¹ Detective Toniazzo who made the transcriptions of the tapes of September 22nd and December 4th stated that, in transcription, the tapes were reviewed countless times over a period of months. The difficulty is an indication of inaudibility not volume. Total reliance in the prosecution was based upon those short sections of greatest inaudibility.

¹² A further example of the way in which Parry exploited the inaudibility of the tapes is demonstrated in the way Parry "proved" Syre was inducing Gibbs to evade a subpoena. Gibbs told Syre he would be prosecuted. Syre told Gibbs what would happen if he did not appear when subpoenaed. (Appendix H, p. A-73). In the following excerpt the portions underlined were *excluded* from the transcripts but are audible in the tapes:

Gibbs: But if I'm not here?

Syre: If they can't find ya (unreadable) ...

Gibbs: They can't do nothing to me? Yea, well...

Syre: *Well, I mean, I'm just telling you like it is. I'm not makin' any (unreadable)*

These critical italicized passages, omitted from the official transcripts, received further distortion in argument of Assistant

The trial started November 23, 1981, with pretrial motions. The jury was empaneled and sequestered on December 1, 1981, and reached its verdict on December 4, 1981.

Prosecution proceeded on the as yet undisclosed theory that Syre was pretending and then sought to cover-up. As best as can be judged the Prosecutor was claiming that Syre was pretending that the payment was limited to the civil settlement and he was not sincere about referring Gibbs to independent counsel for explanation. The *sole* basis for the jury's inference that Gibbs was being induced was Syre's alleged pretense that he was not inducing Gibbs. Gibbs' testimony was that he sincerely wanted to drop criminal charges, communicated this desire to Syre, changed his mind on September 22, 1980, without informing anyone in the union, and that he lied to Syre "on his own".

On December 15, 1980, alternate juror Idol Capriotti reported to defense counsel that two jurors, Barbara Guarancino and Amy Eskild, discussed with him, during sequestration, their concern about improper statements made to them by Judge Kubacki's Court Clerk, Helen Wolf. The Prosecutor then launched an investigation into the misconduct of Capriotti and the impropriety of defense counsel. (Appendix L) The investigation appears to have been calculated to intimidate the jurors for disobeying the judge's admonition not to discuss the case prior to deliberations. (Appendix M) No attempt was made to question Helen Wolf. The investigation, nevertheless, corroborated Capriotti's reports with statements from Guarancino and Eskild. At least one other juror statement cor-

District Attorney, Parry, during the criminal trial. He rhetorically asked the jury:

Then Gibbs says, 'But if I'm not here?' And then Syre says, 'If they can't find you ...' And it is marked on here, 'Unreadable.' I don't know if any of you heard on the tape, 'If they can't find you, you don't have to do it.' (Transcript, Dec. 4, 1981, page 4.112)

roborated Wolf's misconduct which was not disclosed to the defense until the day of the hearing. (Appendix M, pp. A-102-103)

On February 2, 1982, post-trial motions on the jury tampering incident were conducted. Helen Wolf herself testified she told juror Barbara Guarancino, who was anxious about being sequestered over the weekend, that if she paid attention to the evidence and listened to summations it would be a "little" easier to decide the case. (Transcript, Feb. 23, 1982, page 101) At the hearing Juror Capriotti recalled the impatient Guarancino's account of Wolf's remarks: "Well, she told me that Helen Wolf had told her that deliberations should only take five minutes — he's guilty." Juror Amy Eskild said Wolf told her that people who requested jury trials are guilty. Wolf flatly denied the conversation with Eskild. Guarancino, Eskild and Wolf testified for the prosecution.

Prior to the hearing Wolf was counseled by Judge Kubacki not to talk about the incident and she obtained in the judge's chambers copies of the juror's affidavits before the hearing. (Appendix N) Judge Kubacki denied Syre's recusal motion. (Transcript, Feb. 2, 1982, page 5)

Syre's post-trial motions were all denied. Syre was automatically suspended from the practice of law.

On September 2, 1983, the Pennsylvania Superior Court reversed in an opinion limited to the question of evidentiary sufficiency. Syre was reinstated.

On April 3, 1985, the Pennsylvania Supreme Court reversed and remanded finding the evidence sufficient. Syre was suspended.

On November 29, 1985, the Pennsylvania Superior Court reversed the trial court in a decision limited to consideration of the jury question. Syre was reinstated.

On December 12, 1985, Syre filed suit in the Federal District Court for the Eastern District of Pennsylvania against the Com-

monwealth, the Pennsylvania Supreme Court, the Philadelphia District Attorney, and others to enjoin further prosecution and other relief. The case was assigned to the Honorable William Ditter and designated Civil Action 85-7146. The District Court has not, at the date of this Petition for Certiorari, made any substantive rulings.

On December 29, 1985, the Philadelphia District Attorney filed a Petition for Allowance of Appeal seeking reversal of the Superior Court.

On November 10, 1986, the Pennsylvania Supreme Court allowed the appeal and, *ex parte*, reversed the Superior Court.

WHERE QUESTIONS RAISED IN LOWER COURTS

Appeal was taken from the Judgment of Sentence of the Court of Common Pleas of Philadelphia County — Criminal Trial Division, No. 2676, July 1981 dated July 9, 1982 (Opinion dated September 24, 1982).

THE ORDER IN QUESTION:

The order of the Honorable Stanley L. Kubacki dated July 9, 1982, denying the defendant's post-verdict motions for arrest of judgment and/or new trial. Post Trial Motions denied.

AND NOW SENTENCE:

2676 — Two (2) years Probation. Conditions: defendant must stay within a 100 mile radius of Philadelphia, Pennsylvania, plus one (1) year full time service to Philadelphia Legal Services and Costs of Court (\$50.00)

Kubacki, J.

Appeal was taken to the Superior Court of Pennsylvania, No. 2248 Philadelphia 1982. Issues on appeal, each answered in the negative in the trial court, were:

1. Did the Court err in sequestering the jury?

2. Did the Court improperly rule upon the admissibility of recorded conversations?
3. Did the Court improperly refuse to allow evidence to explain the true nature of the charged transactions?
4. Did the Court improperly restrict evidence regarding the credibility of the Commonwealth's main witness?
5. Did the Court improperly permit evidence of third parties entirely unrelated to the defendant?
6. Did the Court improperly refuse to grant a demurrer?
7. Did the Court allow the Commonwealth to present an improper jury argument?
8. Was the jury improperly influenced?
9. Did the Court improperly refuse a motion for a Court *en banc* and a motion for recusal?

The Superior Court reversed on ground 6 (lack of sufficient evidence), *Commonwealth v. Syre*, 469 A.2d 1059 (Pa. Super., 1983), declining to consider other issues raised on appeal. The Pennsylvania Supreme Court reversed and remanded in *Commonwealth v. Syre*, 489 A.2d 1340 (Pa., 1985). The Superior Court reversed the trial court on ground 8 (improperly influenced jury) in *Commonwealth v. Syre*, 501 A.2d 671 (Pa. Super., 1985) declining to consider other issues on appeal. The Pennsylvania Supreme Court reversed and reinstated sentence in *Commonwealth v. Syre*, No. 1453 E.D. Allocatur Docket 1985 (Appendix C)

Thus, a final order has been entered against Petitioner without the Petitioner having received review of issues 1, 2, 3, 4, 5, 7, and 9.

ARGUMENT

1. Denial Of Right To Confrontation

The contradictory aspects of the judicial proceedings instituted against Syre arise from a fundamental lack of confrontation at any stage in the proceedings. Not only is there insufficient evidence upon which to find guilt but there is not even sufficient evidence to know what Gibbs' complaint was.

a. Failure Of Confrontation In Electronic Surveillance

According to the Prosecutor, little, if any, preparation was made for the conduct of surveillance. Gibbs, the consenting agent, did not know what he was investigating. The legalities of a restitution agreement and the lawfulness of seeking dismissal of criminal charges were not understood by Gibbs and they were not clarified by the investigators.

On October 2, 1980, if not at an earlier time, A.D.A. Parry informed Gibbs that the targets of Gibbs' surveillance were not responding in an overtly criminal manner because they were wary. The object of the surveillance was thus not Gibbs' allegations but Teamster evasion of surveillance. The continuation of surveillance using Gibbs, undirected as he was, was thereby guaranteed to produce uncertain results.

b. Lack Of Confrontation In The Nondisclosure Of Tapes

The resulting tapes are inconclusive. The Prosecutor's custody of the tapes was as haphazard as the way in which he produced the recordings. The tape of September 26, 1980, for instance, was not available to Syre for the preparation of his defense. The tape recordings of Rome were never disclosed though they verified the absence of any Teamster intentions to tamper with Gibbs. Yet a Teamster conspiracy to bribe Gibbs was the backbone of the Prosecutor's charges before the jury.

The Prosecutor's claim that the Rome tapes were relevant to the investigation but irrelevant in trial was an indication of the

shifting theories upon which the Prosecutor attempted to justify his questionable use of Gibbs.

c. Lack Of Confrontation In The Charging Of Syre

Nondisclosure and suppression of tape recordings allowed the prosecution of Syre to proceed on the basis of interpretation of fragments of Syre's conversations which Gibbs recorded on September 22, 1980. This procedure reduced the prosecution to the fallacy of inferring antecedents from consequences.

The inferences drawn by the Prosecutor before the jury were not only rationally invalid, they were empirically false. The falsity of the Prosecutor's case was and is verified by the electronic surveillance the Prosecutor refused to disclose.

The isolated fragments of a recorded conversation, upon which the Prosecutor predicated the prosecution, were, by the Prosecutor's argumentative denials, converted from unequivocal secret evidence of spontaneous action to the equivocal evidence of conduct of actors knowledgeable of their own surveillance. The argumentative repudiation of the evidence at the time of trial made it impossible for Syre to know the nature of the charges.

Of far greater importance, through concealment and misrepresentation of the character and quality of the evidence the Prosecutor mislead the court. That process continues to this day.

2. Bias In State Court Proceedings

Generally, factual determinations made by state courts will not be disturbed. However, the central problem of this case is a question of materiality: What is and what is not fact. The United States Supreme Court considered this issue in a case involving the "voluntariness" of a confession extracted in the secret and coercive environment of police detention. *Miller v. Fenton*, 54 L.W. 4022, 4025 (1985). Therein, Justice O'Connor

noted, "...the Court has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.' [cite omitted]

"Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact', or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis. See Monaghan, Constitutional Fact Review, 85 Colum.L.Rev. 229, 237 (1985)."

Your Petitioner submits that this Honorable Court might wish to clarify the principles distinguishing fact and opinion in reviewing the problems of empirical verification involved in the use of electronic surveillance and the problems of inferential verification used in the judicial process as these problems are exemplified in *Commonwealth v. Syre*.

Defined narrowly a denial of fundamental fairness involves a flaw in the truth seeking process that renders the final judgment unreliable. Petitioner submits that in *Commonwealth v. Syre* the denial of fundamental fairness is so extreme that it cannot reasonably be suggested that the results are not absolutely false.

The constitution guarantees due process. That Syre was denied what was due to him as a citizen of the United States is beyond objection. The question here concerns what was wrong with the process of judgment itself that made it impossible for officials entrusted with the administration of law to comply with the law.

The Court has noted the indispensability of proof beyond a reasonable doubt of an accused's guilt to our system of justice in *Ivan V. v. City of New York*, 407 U.S. 203 (1972) (per curiam) and the fundamental importance of confrontation to a fair trial in *Pointer v. Texas*, 330 U.S. 400 (1965).

When government agents manipulated Gibbs in his contractual dealings with the Teamsters they interfered with Gibbs'

restitution agreement. In the recorded conversation of September 22, 1980, Gibbs did not indicate an understanding of the transaction. Syre had no immediate way to verify Gibbs' understanding.

As an attorney Syre must, in the moments he is recorded, presume that the contract is vitiated not because it *is* vitiated but because it *may be* vitiated. In the absence of an ability to verify facts Syre must make a certain judgment so he can act to avoid the vitiation of the contract.¹³

This same problem also confronts the Prosecutor, in the moments surveillance is under way, in his treatment of Gibbs. An acute conflict exists if the Prosecutor has not made a proper inquiry into the legality of the contract between Gibbs and the Teamsters. Verification of Syre's innocence would have catastrophic results for it would prove the Prosecutor himself was interfering in Gibbs' contract with the Teamsters.

To initiate investigation the prosecutor must presume the complaint is true not false. The purpose of electronic surveillance is to verify the truth or falsity of a complaint that has legal sufficiency not avoid its verification. That means the

¹³ In the Pennsylvania Supreme Court's decision Gibbs' so called "odious" lies (489 A.2d at 1342) as a contracting party were treated as irrelevant to the understanding of Syre as the representative of the Teamsters, the party contracting with Gibbs. Of course, Gibbs could not lie without understanding that which he wished to conceal. The "ostensibility" of the contract did not arise from Syre's actions but from Gibbs' actions as they were characterized at the time of trial.

Before the jury, and without notice, Syre was accused of pretense followed by a cover-up. Whether Syre was pretending the bribe was a contract or the contract was a bribe was not clear. But if Gibbs was treating the contract like a bribe then Syre must have been treating the bribe like a contract. Proof beyond a reasonable doubt in this case rests *entirely* upon what Gibbs *thinks*. That this condition exists is worthy of note in evaluating the treatment Gibbs received from the Prosecutor.

target of the investigation must be *presumed* guilty if there is to be any confrontation in the electronic surveillance.¹⁴

The careless manner in which the Philadelphia District Attorney handled Gibbs as a private citizen, "wired" to produce evidence of his own mistreatment, was inherently self-incriminatory for the Prosecutor. A timely admission of error would have been the proper means of solving the problem rather than invoking the judicial process.

In deciding to prosecute without viable evidence the Prosecutor was compelled to discredit his own evidence. It appears that the Prosecutor's "proof" was a negative pregnant.

The prosecution became mired in the effort of negating the issue of Syre's sincerity. The Prosecutor sought to do this by withholding evidence of his own failure to verify Gibbs' complaint to the point of proving Gibbs never even had a legally sufficient complaint to begin with.

When a question of degree is merely negated all other degrees *may be* true. For example, if a table is not three feet high it could be any other height. If there is a *disagreement* then the person who must prove height cannot merely negate one measure of height because that would affirm all other measures. The affirmation of all other measures is *presumed*, not real,

¹⁴ Perhaps an appropriate distinction between an assumption and a presumption is that the assumption has a real reference where the presumption only a logical reference. Assumptions are based upon genuine probabilities and are not involved in establishing certainty in some form of final judgment. Assumptions are not involved in *disagreements* where there is a need for deciding one way or the other on what ever evidence is available. Presumptions, on the other hand, *precede* such final or certain judgments and thereby allocate the burden of proof or persuasion.

because a final decision between two disputing parties must be made, not avoided.¹⁵

The probabilities of catastrophic harm do not have to be great to justify great precaution. But precaution is no virtue in the search for truth. Prudence is not criminal, to punish it is.

3. Unconstitutionality In The Application Of Wiretapping Act

The problem the Prosecutor created for himself in prosecuting Syre was that, as an adversary and proponent of evidence, he was not merely shifting unfairly the burden of proof to Syre. The more the Prosecutor relied on suspicion, doubt, and innuendo to prove Syre's guilt the more the Prosecutor proved his irresponsibility in the conduct of electronic surveillance. The Prosecutor's negations went to the very act of verification itself for which, by law, he was solely and completely responsible. Pennsylvania Wiretapping and Electronic Surveillance Act, 18 Pa.C.S.A. Sections 5701 - 5726.¹⁶

¹⁵ The *affirmation* of a fact or a question of degree is always certain. The negation of a fact is certain. It is either denied argumentatively or falsified, empirically verified to be false. When a question of degree (how high, how long, how sincere, how voluntary, how audible, how true, how fair, etc. as well as facts that only *inferentially* support a conclusion) is negated the extension of the negation is always uncertain. For this reason setting limits on such things as state sovereignty and individual rights is difficult because the limitation is a negation of a power or right only insofar as it is not absolutely complete which is unknown. A limitation stated in a final judicial decision, thus, will always be somewhat uncertain in future judicial applications.

¹⁶ Insofar as the Prosecutor's application of the Act was unconstitutional its constitutionality is challenged in this Petition. Section 5726 provides an action for removal from office when officials intentionally violate the provisions of the Act. The Prosecutor, as an adversary, challenged his own evidence in Syre's prosecution to avoid its possible use in an action where his own intentions might be at issue. The Prosecutor's admission or court's finding of any flaw whatsoever in the procedure or evidence carried with it, inherently, the substantial risk of official accountability under the Act.

In attempting to verify in a judicial proceeding what the Prosecutor refused or failed to verify through the use of the direct and incontrovertible medium of electronic surveillance the Prosecutor contradicted himself. He created an even greater need than may have originally existed to continue the pretense of justifiable prosecution. But ultimately, his actions could only be justified by converting the very principle of doubt itself, the inability to verify, into proof beyond a reasonable doubt.¹⁷

4. Denial Of Right To An Impartial Jury

a. An accused is presumed innocent not because he is innocent but only because he may be innocent. In the rigors of an adversarial proceeding the truth is defined through disagreement. In a fair proceeding, based upon the requirement that the

¹⁷ Section 5711 of the Pennsylvania Wiretapping Act protects privileged communications. This protection was flatly denied to Syre merely by calling Syre's response to Gibbs' request for legal services a pretense. A critical issue, that Syre was *assuming* that Gibbs faced a perjury prosecution was a fact flatly contradicted in the majority opinion: "Gibbs also told [Syre]...officials threatened to prosecute Gibbs for perjury." 489 A.2d at 1343. Justice Zappala noted the inaccuracy in a footnote. (at 1348 note 2.) (See Appendix H, p. A-64, A-70)

In truth, the Pennsylvania Supreme Court's decision is nothing more than a misstatement of the Court's own inaccurate paraphrasing of barely audible fragments of a recorded conversation in which nothing was decided and no criminal conduct was confronted. This truth, the degree to which this characterization is an accurate description of the decision, may be verified by simply reading the transcript (notwithstanding its inaccuracy) and comparing it with the decision.

This self-impeaching condition caused by the non-confrontational use of electronic surveillance for purposes of merely second guessing an attorney facing a difficult legal and ethical problem created intolerable bias in the proceedings. Not surprisingly, Syre could not get review of the trial court's audibility rulings, a so-called 'mixed' question of fact and law. Syre desired the admission, not exclusion, of the September 26th tape which would hardly involve a question of law, that is, a question of prejudice to Syre, the defendant. But isolating a *single* taped conversation was the only pretext for the prosecution needed to justify a covert investigation that backfired.

government prove its case beyond a reasonable doubt, there will be no trace of that presumption left in the final judgment which then may legitimately be assumed to be fair, just, and true.

Syre was brought before a jury merely to question his sincerity with Gibbs who had no legal complaint against Syre. After trial jurors reported an official privately told them Syre was guilty.

b. Nowhere is vigilance in protecting procedural fairness more acute than in the government's management of actual jury deliberations. Nowhere are the presumptions against governmental integrity stronger than when there is a showing of official manipulation of the jury.

At issue is the integrity of the process not merely someone's guilt or innocence. Upon a fair showing of possible prejudice, prejudice is presumed. The harm to be avoided is not only an injury to a defendant but an injury to the judicial process.¹⁸

¹⁸ The fact/law problem of voluntary confessions is analogous. If a confession is not voluntary it could also be totally false. In such a case the very purpose of a judicial proceeding is usurped by oppressive police tactics. The "allocation" of issues in fact/law questions requires localizing the negative pregnant.

"Not voluntary" and "not involuntary" are, like jury prejudice, not completely exclusive. "Voluntary" and "not voluntary" are contraries, not material contradictories. Contraries are incompatible only in truth, but, unlike contradictories, are logically compatible in falsehood. If harm to the truth seeking process is the issue, then, on a showing of coercion, involuntariness should be presumed. Thus, in any particular case the validity of the judicial process depends upon a judicial determination of what facts sufficiently negate involuntariness. (See note 15)

Is a final decision to rest upon a presumption of voluntariness when the results could be totally false due to coercion? In the context of secret police interrogation it seems that a reasonable showing of coercion requires strong factual rebuttal. On appeal, therefore, "voluntariness" insofar as it is not absolutely complete is a question of law and not fact.

Here the record shows that the Prosecutor undertook an investigation of the jury not to disclose official misconduct but to conceal it. Jurors were questioned about their own misconduct as jurors. Official misconduct was down played. Judge Kubacki attempted to intimidate the defense and personally counseled Wolf not to give a statement. Wolf was given access to the investigative record before the hearing on her own misconduct that may have prejudiced deliberations. Cumulative and corroborative evidence gathered in the investigation, subverted as it was, was not disclosed to the defense prior to the hearing.

Bound by law to demonstrate beyond a reasonable doubt no likelihood of prejudice to the jury the Prosecutor relied upon discrediting the testimony of juror's he himself presented as witnesses. Refusing to recuse himself Judge Kubacki improperly ruled the Prosecutor met his weighty burden of proof.

c. The shameful display of judicial despotism exhibited by the Pennsylvania Supreme Court in its sufficiency decision of April 3, 1983, became vindictive on November 10, 1986, when the Pennsylvania Supreme Court reversed a unanimous Pennsylvania Superior Court ruling finding "evidence...which overwhelmingly demonstrates that a representative of the court discussed the accused's guilt". *Commonwealth v. Syre*, 501 A.2d 671, 673-674 (Pa. Super., 1985) Syre received no notice that the District Attorney's Petition for Allowance of Appeal was granted, no notice of hearing, no opportunity to argue the facts pertaining to an evidentiary ruling, and no notice of entry of judgment until after December 4, 1986, when the Office of Disciplinary Counsel of the Disciplinary Board of the Supreme Court of Pennsylvania notified the Pennsylvania Supreme Court of its intention to summarily suspend Syre, yet again, from the practice of law.

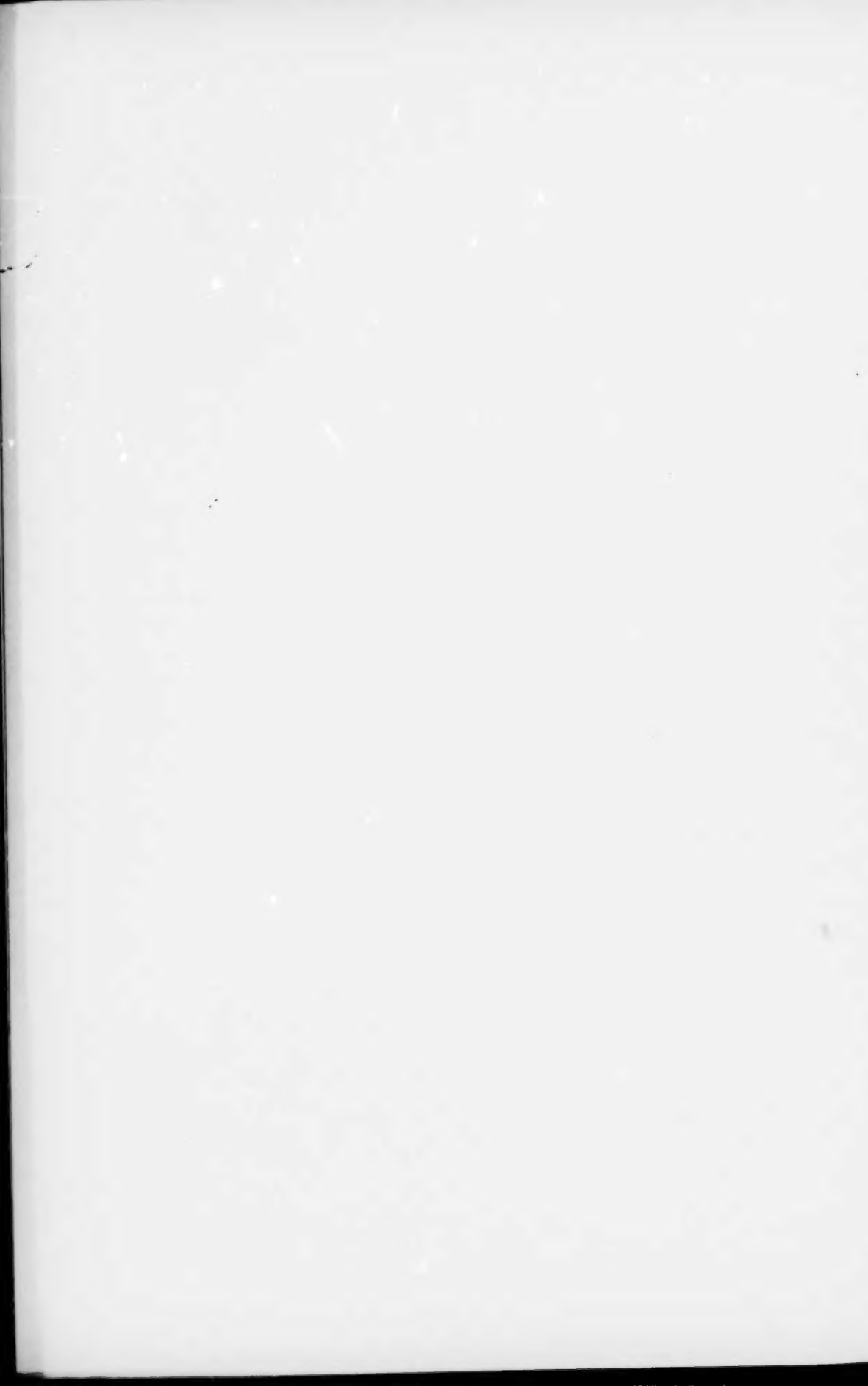
Incontestably a court officer, Helen Wolf, by her own admission told a juror that deliberations would be easy on the

evidence presented against Syre by the Prosecutor. She flatly contradicted another juror who testified that Wolf told her people who request jury trials were guilty. It is submitted that under United States Supreme Court precedents the testimony of a court clerk accused by jurors of making statements about the strength of the evidence and the guilt of the accused does not overcome the presumptive unfairness involved in official, *ex parte* contact with sequestered jurors. *Parker v. Gladden*, 385 U.S. 363 (1966), *Remmer v. United States*, 347 U.S. 227 (1954).

CONCLUSION

For the foregoing reasons your Petitioner, Richard R. Syre, respectfully requests that this Honorable Court grant his Petition for a Writ of Certiorari, review the issues raised in this Petition, and provide the redress under the Constitution of the United States that has so far been denied to your Petitioner by the Commonwealth of Pennsylvania.

Richard R. Syre, *pro se*
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Woodruff, Wisconsin 54568
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APPENDIX



APPENDIX A

COURT OPINION

Pennsylvania Supreme Court Opinion: No. 26 E.D. Appeal Docket, 1984, 489 A.2d 1340 (Pa., 1985) Dated: April 3, 1985. Reversing and remanding Superior Court decision finding lack of sufficiency.

Eric B. Henson, Deputy Dist. Atty., Philadelphia, for appellant.

F. Emmett Fitzpatrick, Philadelphia, for appellee.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

In a trial by jury in the Court of Common Pleas of Philadelphia County, the appellee, Richard Syre, was convicted of the felony of witness tampering. A judgment of sentence of two years probation was imposed. On appeal to the Superior Court, the conviction was reversed, and appellee was discharged. *Commonwealth v. Syre*, 322 Pa. Super. 416, 469 A.2d 1059 (1983). The instant appeal ensued. The sole issue presented is whether the evidence adduced by the Commonwealth was sufficient to sustain the conviction. The witness tampering charges arose in the context of the following factual background.

In June of 1980, Teamsters Local 115 was engaged in a campaign to organize workers at the Penn Radio Cab Company in Philadelphia. The workers at the Penn Radio Cab Company went out on strike, at the instigation of the Teamsters, and set up a picket line. One of the workers, Ezekiel Gibbs, who was employed as a cab driver, became disenchanted with the Teamsters' efforts and decided that his interests would best be served by not joining a union. Thus, on June 27, 1980, Gibbs

crossed the picket line and drive his cab away to commence working again. He was then allegedly pursued and assaulted by five union members, and, in the course of the altercation, Gibbs suffered injuries to his teeth. Gibbs filed a criminal complaint against the union members alleged to have been involved in the assault.

Subsequently, Gibbs met with a business agent of Local 115 to discuss the incident. Gibbs had decided to withdraw the criminal charges, in the interest of laying to rest his difficulties with fellow employees, and he made this fact known to the agent at the start of the meeting. Gibbs sought compensation for the injuries he sustained in the assault, and a settlement in the amount of \$1,600 was agreed upon. According to Gibbs' testimony, this sum was to be paid in exchange for a release of the union from civil liability, as well as for withdrawal of the criminal charges. The union's business agent testified, however, that the payment was to be for a release of the civil liability alone. In any event, no portion of the \$1,600 settlement was paid to Gibbs at that time.

In the ensuing weeks, Gibbs became impatient with the union's failure to deliver the \$1,600. Hence, on several occasions during August and September of 1980, Gibbs met with appellee, the union's legal counsel, to inquire as to the reasons that the settlement funds had not been paid. During that time, appellee also represented one or more of the union members against whom criminal charges had been filed. At these meetings, appellee made certain statements to Gibbs that were used by the prosecution as a basis for bringing charges of witness tampering.

It is of interest to note that the union members involved in the alleged assault were eventually brought to trial. Gibbs testified in the instant proceeding that he never withdrew the charges, despite his earlier expressed intent to do so, because he was being harassed and threatened by co-workers at the cab company, and because the union had not been prompt in delivering all of

the settlement money that had been promised. It was the contention of appellee, however, that Gibbs' decision not to drop the charges was the result of pressures exerted by Philadelphia District Attorney Edward Rendell, and former Philadelphia prosecutor Richard Sprague, who allegedly conspired to wage a politically motivated vendetta against John Morris, an influential labor boss in the Philadelphia area, who was a leader of Teamsters Local 115. Indeed, at trial, appellee testified that he regarded Richard Sprague as a predatory person who framed labor boss Tony Boyle in connection with the prosecution of Boyle for the murders of the Yablonski family, a family headed by a competing labor leader. Richard Sprague's law firm served as legal counsel to the Penn Radio Cab Company during its labor dispute with Local 115. Allegations of a conspiracy between Richard Sprague and Edward Rendell appeared in appellee's testimony at trial, as well as in transcripts of certain recorded conversations between Gibbs and appellee which are discussed infra. In short, it is appellee's view that prosecution of the union members for the alleged assault upon Gibbs was an attempt to bring pressures to bear upon John Morris. Whether appellee, through his representation of the union, became a casualty of a power play between union and prosecutorial officials is not, however, within the scope of our inquiry. Irrespective of the motivations underlying the incidents which led to appellee having contact with the witness Gibbs, appellee is accountable under the law for his conduct in interacting with Gibbs, and the sole issue raised in this appeal is the sufficiency of the evidence to sustain appellee's conviction for witness tampering.

It is well established that the test of sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences favorable to the Commonwealth, the trier of fact could reasonably have determined all elements of the crime to have been established beyond a reasonable doubt. *Commonwealth v. Keblitis*, 500 Pa. 321, 323, 456 A.2d 149, 150 (1983); *Commonwealth v. Kennedy*, 499 Pa. 389, 392, 453 A.2d 927, 928 (1982). The evidence adduced at trial established the following.

On August 21, 1980, appellee delivered to Gibbs the sum of \$400, as partial payment of the \$1600 owed under the settlement, described supra., that had been agreed upon by Gibbs and the union's business agent. In exchange for the \$400, Gibbs signed an agreement in principle to release the union from civil liability. Gibbs testified that appellee stated, at the time of delivering the \$400, that the remaining \$1200 of the settlement funds would not be paid until the criminal charges had actually been dropped. Appellee testified that, on the day in question, he had no discussion with Gibbs regarding the dropping of criminal charges. Indeed, as to the Bill of Information charging appellee with tampering with a witness on August 21, 1980, appellee was acquitted. Appellee was found guilty, however, upon a Bill of Information charging him with tampering with a witness on September 22, 1980.

Subsequent to his August 21, 1980 meeting with appellee, Gibbs decided, upon motivations heretofore discussed, *not to withdraw the criminal charges*. He did not inform appellee of this decision. On September 22, 1980, Gibbs met with members of the district attorney's office, and consented to wear a hidden recording device to record his future conversations with appellee. Later that day, Gibbs met with appellee on two occasions, and the tape recordings of those meetings form the heart of the case against appellee. We have reviewed the transcripts of the recorded conversations, and find them to be replete with instances from which the jury could have concluded that appellee employed an offer of pecuniary benefit in an effort to exert unlawful influences upon Gibbs. In short, the conversations reveal that Gibbs was to be paid the sum of \$1600, *ostensibly* for a release of civil liability, but with the threat that the full amount of the funds would not be paid until Gibbs had "cooperated" by doing whatever was necessary to obtain dismissal of the criminal charges. The "cooperation" required of Gibbs consisted of changing his testimony, to indicate that his earlier accounts of the assault had been exaggerated or that his memory of the assault had failed. In addition, there was a

discussion of the possibility of Gibbs ignoring a subpoena in order to elude having to testify at trial.

An especially odious aspect of this case is that the taped conversations that were secured by Gibbs were obtained as a result of Gibbs making certain statements to appellee which were lies, and these lies produced further conversation from appellee. Gibbs testified that the deceptions were of his own invention, and that the lies were not suggested by the district attorney's office. Thus, in the tape recorded conversations, Gibbs told appellee that Gibbs was in urgent need of the settlement funds to repay money owed to a threatening individual known as "the man." Gibbs also told appellee that he had spoken with prosecutorial officials to ask them to withdraw the criminal charges, and that those officials threatened to prosecute Gibbs for perjury if he contradicted his previous statements regarding the assault. In addition, he told appellee that prosecutorial officials threatened to subpoena him to testify at the criminal trial. None of the foregoing statements to appellee were true. Notwithstanding the distasteful manner in which the taped conversations were obtained, the transcripts of the conversations do reveal an ample basis upon which the jury could have concluded that appellee employed an offer of pecuniary benefit to induce Gibbs to "testify or inform falsely," 18 Pa.C.S.A. § 4907(a)(1), "withhold ... testimony," 18 Pa.C.S.A. § 4907(a)(2), "elude legal process summoning him to testify," 18 Pa.C.S.A. § 4907(a)(3), or "absent himself" from a summoned appearance at a criminal trial, 18 Pa.C.S.A. § 4907(a)(4).¹

¹ The elements of the offense of witness tampering applicable to appellee's prosecution were set forth in 18 Pa.C.S.A. § 4907, which provided as follows:

(a) Offense defined.—A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to:

The first of the two tape recorded conversations took place at City Hall, on September 22, 1980, when Gibbs attempted to collect the remaining \$1200 of settlement funds owed him. That conversation proceeded as follows.

Appellee informed Gibbs that the trial in the criminal assault case was scheduled to commence on December 15, that the district attorney refused to drop the charges, and that the funds due Gibbs for settlement of his civil action would not be delivered, in full, until the criminal case was dismissed. Gibbs was then instructed that he would have to speak with Assistant District Attorney Charles Klein to obtain dismissal of the charges. Gibbs demanded that, if he were to speak to Klein, appellee would have to pay more money, and Gibbs expressed an urgent need for funds to repay a debt owed to a threatening individual known as "the man."

Appellee then lapsed into a diatribe concerning former assistant district attorney Richard Sprague, stating that the prosecution was influenced by Sprague to "throw the book" at the union members who assaulted Gibbs, and noting that Sprague represented Penn Radio Cab Company in the labor dispute from which the assault upon Gibbs arose. In short, appellee portrayed himself and Gibbs as "little guys" caught up in a prosecution that was brought at the behest of Sprague, whom appellee regarded as a very powerful individual in Philadelphia.

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- (1) testify or inform falsely;
 - (2) withhold any testimony, information, document or thing except on advice of counsel;
 - (3) elude legal process summoning him to testify or supply evidence; or
 - (4) absent himself from any proceeding or investigation to which he has been legally summoned.
- (b) Grading.—The offense is a felony of the third degree; if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor of the second degree.

Gibbs then accused appellee of breaching their agreement as to the time for payment of the civil action settlement funds. Appellee replied that he had never promised to deliver the funds by that date, and that he had only hoped to do so. Appellee informed Gibbs that the assistant district attorney had declared that the criminal case would proceed regardless of whether Gibbs requested otherwise, and that this presented an obstacle to paying for the civil settlement. Gibbs was then warned that if he proceeded with the criminal trial on December 15 there would be no point in appellee and Gibbs engaging in any further conversations. Appellee offered to perhaps "sweeten the deal" by paying more than had been agreed upon as the "civil settlement," but conditioned any additional payments upon Gibbs taking certain steps to secure dismissal of the charges.

The measures which Gibbs would be required to take were expressly set forth by appellee, and they consisted of the following. Gibbs would have to speak with Charles Klein and tell him that he, Gibbs, of his own free will, had decided to drop the charges. Appellee cautioned Gibbs that Klein would inquire as to whether Gibbs had been threatened, or offered money, as an inducement for withdrawing the charges, Gibbs was instructed to say that there had been a misunderstanding, that Gibbs wanted to retain his friendships with co-workers who were defendants in the criminal action, that reports of the assault had been greatly exaggerated, that Gibbs had not anticipated that the prosecution would pursue charges other than simple assault, such as theft and conspiracy, and, finally, that Gibbs did not want to discuss the matter any further with prosecutorial officials.

Appellee told Gibbs that, after meeting with Charles Klein, Gibbs would have to go to the office of the district attorney and speak with Edward Rendell. Appellee explained that Gibbs would have to do a lot of "tap dancing" in his conversations with Klein and Rendell. Gibbs was apprised that, even after speaking with Klein and Rendell, he would not receive the full balance of the promised funds until the criminal charges were in

fact dismissed. In the event charges were not dismissed, and trial commenced as scheduled on December 15, Gibbs was told that he would have to do "whatever was required" to assist in terminating the criminal action if he were to secure full payment for settlement of his civil claim. Appellee stated that he could deliver, later that day, an additional portion of the promised settlement funds, if Gibbs would first speak with Charles Klein and report to appellee regarding that conversation. Gibbs stated that he would accept that arrangement, and, after Gibbs was repeatedly directed to deny having had this conversation with appellee, appellee demanded that Gibbs promise to follow through with the actions they had discussed.

After the foregoing discussion at City Hall concluded, Gibbs met with appellee again later that same day at a Burger King restaurant. At this meeting, Gibbs was again wearing a hidden recording device. The conversation at the restaurant proceeded as follows.

Gibbs reported that he had conferred, as requested, with Klein and Rendell, and that they were pressuring him by threatening to subpoena him to testify at the December 15 trial. He further reported that he had been threatened with the possibility of being prosecuted for perjury. This news evoked another discourse from appellee regarding the perceived evils of Richard Sprague. Appellee then delivered to Gibbs an additional portion of the settlement funds, to wit \$400, this sum having been promised to Gibbs earlier that day in exchange for Gibbs' talking with Charles Klein. Delivery of this sum reduced to \$800 the balance of settlement funds still owed to Gibbs. Appellee reiterated that Gibbs "must cooperate" with him if the criminal cases go to trial, with the additional admonition that they were "playing with the big guys." Appellee told Gibbs that the district attorney would continue to try to pressure him, but that the district attorney could not force Gibbs to do anything. The political motivations of the district attorney, and of Richard Sprague, were cited by appellee as the reasons for Gibbs being pressured to proceed with the criminal action, and

appellee expressed his opinion that Sprague and the district attorney were engaged in a scheme to create pressures upon John Morris, a labor boss in the Philadelphia area.

Appellee advised Gibbs as to how to avoid being forced by the district attorney to testify in the criminal trial. Specifically, appellee explained that Gibbs would be subject to prosecution for perjury if, when called as a witness at trial, Gibbs testified contrary to a signed statement given under oath. To avoid such a prosecution, Gibbs was instructed to testify falsely that his memory had failed, and to testify falsely that he had instigated the affray with the union members by calling one of them a name. Appellee told Gibbs to testify that he had not previously mentioned this latter act of provocation because he was too emotional to remember it at the time of issuing his statement under oath.

Gibbs was then informed that he would have to talk to the district attorney again, and appellee suggested that if the district attorney chose to subpoena Gibbs to testify at trial, Gibbs could ignore the subpoena. Appellee stated that only if Gibbs could be located by the sheriff and transported into the courtroom would it be necessary for Gibbs to testify. Appellee reiterated that Gibbs' testimony should be that the entire incident had become grossly exaggerated, and that Gibbs could safely claim that his recollection of the incident had failed. For instance, despite Gibbs' repeated statements to appellee that his recollection of the incident was clear, and in spite of Gibbs' assertions that he knew and could clearly identify the five union members who assaulted him, appellee persisted in telling Gibbs that Gibbs' memory had failed. Appellee then asked Gibbs to tell the district attorney that, at the time of identifying the persons who committed the assault, Gibbs had been under pressure which caused him to make identifications of which he was not certain.

As this conversation proceeded, appellee directed that if Gibbs were ever asked about the reasons for money having been delivered to Gibbs by appellee, Gibbs should respond that the

money having been delivered to Gibbs by appellee, Gibbs should respond that the money was for settlement of the civil action, and appellee commented that much of their arrangement would have to rest upon trust in one another. Appellee explained that the remaining \$800 in settlement funds would be paid whenever the criminal case was over, provided that Gibbs demonstrated the cooperation that was required of him. Gibbs then reminded appellee that earlier that day appellee had agreed to "sweeten the pot a little," whereupon appellee again promised to secure some extra money for Gibbs. Appellee warned Gibbs, however, not to "push his luck," because Gibbs was dealing with some "very dangerous" people, people who "play with knuckles" and who play "hard ball," and appellee characterized himself as one of those "honorable" but "rough" people. Appellee concluded the conversation by saying that Gibbs was "playing it fairly well," and after again stressing the need for Gibbs to cooperate in order to receive the promised funds, appellee once again stated his view that the district attorney was acting under political motivations in prosecuting the union members.

Subsequent to these conversations with appellee, Gibbs, on October 29, 1980, signed a final release agreement, superseding the agreement in principle to release claims of civil liability that had been executed circa August 21, 1980, the latter date being that on which appellee delivered to Gibbs the first \$400 installment of the settlement amount. The final release contained language stating that it was applicable to civil liability alone, and further stating that no obligation was thereby created for Gibbs to refrain from prosecution of any criminal actions. In reversing appellee's conviction, Superior court placed much emphasis upon this language in the final release, regarding it as clear evidence that no effort had been made to unlawfully influence Gibbs. We believe Superior Court disregarded the clear import of the conversations heretofore described, and that, in view of the contents of those recorded conversations, the jury no doubt regarded the language in the final release as a subter-

fuge designed to conceal the witness tampering that the jury found to have occurred on an earlier date, September 22, 1980. Indeed, the tape recorded meetings contained numerous instances of conversation between appellee and Gibbs from which the jury could have concluded that appellee unlawfully influenced Gibbs.

Thus, we reverse the order of the Superior Court, reinstate the judgment of sentence, and remand this case to Superior Court for disposition of appellee's remaining appellate claims.

Order reversed, judgment of sentence reinstated, and case remanded.

ZAPPALA, J., files a dissenting opinion which LARSEN, J., joins.

ZAPPALA, Justice, dissenting.

I must disagree with the majority's conclusion that the evidence presented in Appellee's criminal prosecution rose to a level sufficient as a matter of law to prove the information filed.

From a review of the record, I find, as did the Superior Court, that Appellee dealt with Gibbs with the sole intent of settling the possible civil and criminal effects arising out of an assault on Gibbs. It is important to note that this is not a question of an individual attempting to contact or influence a witness to a prosecution, but rather one of an attorney for one of the parties negotiating with the sole victim of an assault for restitution after the victim had expressed a desire to settle. The mere act of an attorney for a criminal defendant negotiating a complete settlement with the sole victim of the defendant's conduct which subjects said defendant to both civil and criminal liability is not violative of either the letter or the spirit of the witness tampering prohibition. Indeed, this practice is frequently utilized with approval by courts throughout the Commonwealth as a means of expediting the criminal system.

Appellant was convicted of witness tampering under then-in-effect 18 Pa.C.S.A. § 4907. That section provided as follows:

(a) *Offense defined.*—A person commits an offense if believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to:

(1) testify or inform falsely;

(2) withhold any testimony, information, document or thing except on advice of counsel;

(3) elude legal process summoning him to testify or supply evidence; or

(4) absent himself from any proceeding or investigation to which he has been legally summoned.

(b) *Grading.*—The offense is a felony of the third degree if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor of the second degree. (emphasis added)

Clearly, from the italicized portions of the statute above, section 4907(a) requires a particular mens rea, namely, that the actor possessed the subjective belief that an official proceeding was pending or about to be instituted and that the actor specifically intended by his conduct to induce or cause a witness or informant to take any of the unlawful actions enumerated in subsections (1)-(4). Moreover, to rise to the felony level, the actor must employ force, deception, threat or the offer of pecuniary benefit in the attempt to achieve said specific intent. In the absence of the rare direct expression of an actor's subjective intent and state of mind, the mens rea must necessarily be proven by circumstantial evidence and inferences arising from the actor's words and deeds.

As this Court has stated many times, the test for reviewing the sufficiency of the evidence is:

[W]hether accepting as true all the evidence and all reasonable inferences deductible from such evidence, upon which the trier of fact could have based its verdict, the evidence and inferences are sufficient in law to prove guilt beyond a reasonable doubt. (citations omitted). Moreover, in reviewing the evidence, we must consider it in the light most favorable to the verdict winner. (citations omitted).

Commonwealth v. Scudder, 490 Pa. 415, 418, 416 A.2d 1003, 1005 (1980). Further, while wholly circumstantial evidence may sustain a criminal conviction if sufficiently strong to support an inference of guilt beyond a reasonable doubt as to each material element of a crime, *id.*, the conviction may not be based upon mere surmise or conjecture. *Commonwealth v. Thomas*, 465 Pa. 442, 446, 350 A.2d 847, 849 (1976); *Commonwealth v. Derr*, 501 Pa. 446, 462 A.2d 208 (1983). As we stated in *Commonwealth v. New*, 354 Pa. 188, 221, 47 A.2d 450, 468 (1946), “[w]hen two equally reasonable and mutually inconsistent inferences can be drawn from the same set of circumstances, a jury must not be permitted to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty.” See also *Commonwealth v. Wojdak*, 502 Pa. 359, 367-70, 466 A.2d 991 (1983) (Opinion announcing the judgment of the Court).

With the foregoing principles in mind, I have reviewed the record and find it inadequate to support appellee’s conviction for tampering with a witness; specifically, I find insufficient evidence to demonstrate beyond a reasonable doubt that appellee possessed the requisite *mens rea*.

As to the charges stemming from the events of August 21, 1980, the evidence against appellee was primarily the trial testimony of Ezekial Gibbs who testified that \$1,600 would be paid him by the Teamsters union in exchange for Gibbs dropping the criminal charges against the union members and for settlement of the civil suit. Gibbs’ testimony was contradicted by

appellee and the union's business agent, and appellee was acquitted on the charges of tampering pertaining to his actions of August 21, 1980.

As to the charges stemming from the events of September 22, 1980, for which appellee was found guilty, the evidence against appellee consisted of the tape recorded conversations between appellee and Gibbs. The transcript of substantial portions of those conversations are set forth in the majority opinion, obviating my need to do so in this opinion. However, I cannot read those conversations or any other record evidence as supporting a criminal intent on appellee's part—not even by a preponderance of the evidence and certainly not beyond a reasonable doubt.

From the beginning when Gibbs discussed the matter with the Teamsters' business agent, Gibbs expressed *his* intention to drop the criminal charges against the union members. The business agent relayed this information to appellee and Gibbs confirmed his stated intention to drop the criminal charges in *all* of his discussions with appellee. Gibbs admitted at trial that he never informed either appellee or any union official that he had changed his mind and decided to pursue the prosecution of the union members. Accordingly, it is uncontradicted that at all times appellee acted on the belief that Gibbs did not intend or desire to press the criminal charges.

Appellee made several unequivocal statements to Gibbs on September 22nd that the money to be paid him by the union was strictly for settlement of Gibbs' civil claims against the union and its members, "no matter what happen[ed]" with the criminal charges.¹ That is, the money for the settlement of the civil claims would be paid whether or not the union members were criminally prosecuted. See note 2, *supra*. These unequivocal statements were buttressed by the language of the final

¹ See, e.g. Brief for Appellant, Appendix D at 2, 8, 13; Appendix E at 10.

release executed by Gibbs which states: "This Release does not apply to any criminal proceedings nor does it place me under any obligation whatsoever to refrain from the prosecution of any criminal actions...." Appellee also stated several times to Gibbs that the decision whether to prosecute was to be made of his own free will. He further told Gibbs that his clients needed Gibbs' cooperation in the withdrawal of the criminal charges and explained what that cooperation might entail.

Maintaining the posture that he intended to drop the criminal charges, Gibbs began to lie to appellee. Gibbs admitted at trial that he lied to appellee in telling appellee that the District Attorney's office intended to subpoena him (Gibbs) and had threatened to prosecute him if he did not proceed on the criminal charges. Responding to these lies "as an attorney", appellee discussed with Gibbs the possibilities of what might happen to him (Gibbs) in a prosecution for perjury² and explained the mechanics of the subpoena process. Appellee advised Gibbs, however, to discuss these matters with independent counsel, and referred Gibbs to another attorney.

Finally, it should be noted that Gibbs did, in fact, receive the agreed-to settlement sum and that the union members were, in fact, prosecuted on the criminal charges stemming from the picket-line incident.

Even if appellee's taped conversations were susceptible of the inference that appellee counselled Gibbs on *how to* change his testimony and *how to* avoid a subpoena, as the majority infers, there is *nothing* in those conversations or elsewhere on the

² From both the taped conversations and appellee's trial testimony, it appears that appellee believed that, when Gibbs suggested the District Attorney's office threatened him (Gibbs) with prosecution, such "prosecution" would be for perjury; that is, for giving prior sworn statements to the police investigators which contradicted his present posture of wishing to drop the case. Accordingly, appellee offered some suggestions as to what Gibbs might say at trial, if a trial was held, that would not place him in jeopardy of perjury charges.

record from which one could infer that *appellee* was attempting to induce Gibbs to alter his testimony or “duck” service. To the contrary, the record demonstrates that Gibbs induced *appellee*, through misrepresentations, to offer advice on the possibility of perjury and the possibility of ignoring a subpoena. Even though *appellee*’s advice may have been ill-advised, there is no support for the inference that it was rendered with the requisite *mens rea* or criminal intent. It was Gibbs who made manifest *his intention* to drop the criminal charges against *appellee*’s clients; it was Gibbs who deceptively elicited *appellee*’s advice on Gibbs’ possible prosecution for perjury; it was Gibbs who deceptively elicited *appellee*’s advice regarding the subpoena; Gibbs was, consequently, the “inducer,” not the “inducee.” Even if the contrary inference (that *appellee* attempted to induce Gibbs to alter his testimony or elude legal process) were equally supported by the record (which it is *not*), a jury must not be permitted to guess or to speculate as to its choice of equally compelling inferences, one lawful and one unlawful, where the quantum of proof required is *proof beyond a reasonable doubt*. See, e.g., *Commonwealth v. New*, *supra* and *Commonwealth v. Scudder*, *supra*. Accordingly, I would hold that the Commonwealth has failed to meet its burden of establishing a material element of the crime of tampering with a witness as it has produced insufficient evidence to demonstrate that *appellee* attempted to induce or otherwise cause Gibbs to testify falsely, to withhold testimony, to elude legal process or to absent himself from proceedings.

Moreover, even if the requisite criminal intent were present (which it is *not*), the offense in this case could not be graded higher than a misdemeanor of the second degree, for there is no proof that the actor employed force, deception, threat or offer of pecuniary benefit. 18 Pa.C.S.A. § 4907(b). The only suggestion of an offer of pecuniary benefit is the \$1600 (and a *possibility* of coming up with a bit more) for the settlement of Gibbs’ civil claims. However, the unequivocal tape recorded conversations and the language of the final release prove that

appellee made it quite clear that Gibbs would receive that amount for settlement regardless of whether he withdrew the criminal charges, even though the union and appellee expected and desired Gibbs' cooperation on those charges. Payment was actually made despite the prosecution to trial of those charges. The record does not support, therefore, a finding that the appellee's conduct was accompanied by an offer of pecuniary benefits in exchange for Gibbs' performing all or some of the actions enumerated in 18 Pa.C.S.A. § 4907(a)(1-4).

Because the judiciary must take care to ensure that law enforcement officers do not cross the line between active investigation and zealous advocacy of the public's interests, on the one hand, and active participation in the manufacture of crimes, on the other, my careful review of the entire record compels me to note my dismay at the questionable tactics employed in the instant case. As set out before, the record clearly indicates that it was Gibbs' sole intention and desire to drop the criminal charges against the four defendants. He communicated this desire to Joe Yeoman of the Teamsters Union. It was only after Gibbs had contacted the District Attorney's Office and agreed to be wired with a tape recorder that the testimony indicates Gibbs' "change of heart." The transcripts of those covert recordings viewed in the light of the earlier happenings reveal the attempt by Gibbs through various fabrications to lead the Appellee into making statements that would incriminate him in a scheme to influence Gibbs' decision to prosecute. Gibbs several times admits that statements he made to Syre were complete fabrications. I must therefore emphasize to all prosecutors that the function of the prosecutor's office is not to merely seek convictions, but rather to seek justice.

For the foregoing reasons, I would affirm the Superior Court's order reversing Appellee's conviction and discharge him.

LARSEN, J., joins in this dissenting opinion.

APPENDIX B

COURT OPINION

Pennsylvania Superior Court, No. 2248, Philadelphia, 1982, 469 A.2d 1059 (Pa. Super., 1983) Dated: September 2, 1983) Reversing trial court on sufficiency grounds.

F. Fitzpatrick, Jr., Philadelphia, for appellant.

Eric B. Henson, Asst. Dist. Atty., Philadelphia, for Commonwealth, appellee.

Before CERCONE, President Judge, and ROWLEY and CIRILLO, JJ.

CIRILLO, Judge:

This is an appeal from the judgment of sentence of the Court of Common Pleas of Philadelphia County, dated July 9, 1982.

In June of 1980 the appellant Richard Syre, was a lawyer for Teamsters Local 115, located in Philadelphia. At this time the teamsters were engaged in a campaign to organize workers at the Penn Radio Cab Company. The workers at Penn Radio went out on strike, at the instigation of the union, and set up a picket line. A man by the name of Ezekiel Gibbs opposed the union's efforts and continued to work while other drivers struck. Gibbs drove a cab through a picket line on June 27, 1980 and allegedly was assaulted by several union members. These individuals were arrested and subsequently brought to trial.

While these criminal charges were pending, Gibbs met with a union official to discuss this strike-related incident. Gibbs had sustained economic losses as a result of injury to his teeth and requested compensation in the amount of \$2000.00. According to the union, the official made it quite clear that settlement was only for the proposed civil suit which Gibbs had threatened to

bring against the union. However, according to Gibbs' version, the official told him that the settlement was for both the civil liability and the withdrawal of criminal charges.

In any event, Gibbs met with the appellant on several occasions during August and September of 1980 regarding this matter. In September, 1980, Penn Radio became aware that Gibbs was considering the withdrawal of criminal prosecution. Gibbs later testified at trial that indeed he did not wish to proceed with the criminal prosecution and was even seriously considering taking the settlement money and leaving town. Penn Radio prevailed upon him not to drop the criminal prosecution but, instead, to go to the Philadelphia District Attorney's Office and become part of an investigation concerning certain union officials. Gibbs did so and on September 22, 1980 he agreed to wear a Nagra tape recorder and to tape his conversations with the appellant and others.

After several conversations had been recorded, the appellant was charged with the offense of tampering with a witness.¹ The appellant was tried before the Honorable Stanley L. Kubacki and a jury and was convicted. Post-verdict motions were argued and denied and the appellant was sentenced to 2 years probation. This appeal followed.

The appellant alleges, on appeal, that the lower court erred in refusing to grant his demurrer.² We address this issue as a suffi-

¹ Act of December 6, 1972, P.L. 1482, No. 334, Sec. 1, 18 Pa.C.S.A. § 4907. This offense was repealed by the Act of December 4, 1980, P.L. 1097, No. 187, Sec. 2, effective in 60 days. The offense is now captioned "Intimidation of witnesses or victims" and appears at 18 Pa.C.S.A. § 4952. See: *Commonwealth v. Vitacolonna*, 297 Pa.Super. 284, 288 n. 2, 443 A.2d 838, 840 n. 2 (1982).

² The appellant frames this issue in terms of whether the trial court erred in not sustaining his demurrer to the evidence. However, he did not rest following this adverse ruling but elected to put in a case in defense. Thus, the correctness of the ruling on demurrer is no longer an available issue. *Commonwealth v. McNeal*, 49 Pa. 395, 426 A.2d

ciency of the evidence question. The evidence is sufficient if it supports the verdict beyond a reasonable doubt when construed in the light most favorable to the Commonwealth, with all proper inferences drawn in the Commonwealth's favor. *Commonwealth v. Edwards*, 49 Pa. 281, 426 A.2d 550 (1981); *Commonwealth v. Galloway*, 302 Pa.Super. 145, 448 A.2d 568 (1982).

The offense of tampering with a witness is defined in 18 Pa.C.S.A. § 4907 as follows:

(a) Offense defined. — A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to:

- (1) testify or inform falsely;
- (2) withhold any testimony, information, document or thing except on advice of counsel;
- (3) elude legal process summoning him to testify or supply evidence; or
- (4) absent himself from any proceeding or investigation to which he has been legally summoned.

(b) Grading. The offense is a felony of the third degree; if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor of the second degree.

The testimony of Gibbs indicates that before he ever talked to the union official regarding compensation for his injuries, he decided to drop the criminal charges against the union members

606 (1981); *Commonwealth v. Galloway*, *supra*; *Commonwealth v. Kaster*, 300 Pa.Super. 174, 446 A.2d 286 (1982). However, we may treat this question as if it had been properly raised as a challenge to the sufficiency of the evidence. *Commonwealth v. McNeal*, *supra*; See also: *Commonwealth v. Ilgenfritz*, 466 Pa. 45, 47 n. *, 353 A.2d 387, 388 n. * (1976).

since he was going to have to work side-by-side with them. Likewise, at the time the parties had reached a settlement figure of \$1600.00, Gibbs informed the union official and the appellant of his intention to drop the criminal charges. Moreover, on August 21, 1980, when the appellant gave Gibbs the first \$400.00 of his settlement, Gibbs had not changed his mind regarding the criminal charges. Later, Gibbs changed his mind and decided to press the criminal charges. However, Gibbs testified that he never told the union official or the appellant that he changed his mind and wished to bring these charges. Upon reviewing this portion of the record, we are compelled to inquire; why would the appellant pay off Gibbs for not bring criminal charges when Gibbs had never indicated to the appellant or union official that he was going to bring these charges?

The Commonwealth presented evidence during trial as to the appellant's true intent under section 4907. The record is replete with segments from the taped conversations between Gibbs and the appellant which convey ambiguous meanings. The Commonwealth claims that these extracts show the appellant's intent to bribe the witness, whereas the appellant contends that he was merely advising Gibbs based upon the half-truths and misrepresentations made by the witness.

Gibbs testified that he was told by both the appellant and the union official that the settlement was for the civil and criminal actions. Nevertheless, at no point in the taped conversations which had been admitted into evidence did the appellant state that the money was to be paid to drop the criminal charges. To the contrary, several excerpts express that the settlement concerned only the civil liability.³

³ A typical example is the following quotation:

SYRE: "Well that's up to you. We're paying you, ah, we're making a deal to settle the civil liability. Ah, you're still at the ah, ah, you're still working there, right?"

The Commonwealth maintains that on September 22, 1980, Gibbs met with the appellant at City Hall and was advised on how to drop the criminal charges so as to receive his settlement money. However, the record fails to substantiate this claim.⁴ In fact, the evidence indicates that the civil settlement money was to be paid no matter what happened to the criminal case.⁵

⁴ The Commonwealth's allegation is based upon the following conversation:

SYRE: Now you're gonna have to talk to [the assigned prosecutor]. If you want to drop it, you're going to have to talk to him.

* * * * *

SYRE: Well he's right in that room there, [the assigned prosecutor]. Now I...listen I

...

GIBBS: You gon point him out to me?

SYRE: I can't...I can't go...I'll point him out to you but I can't be involved in that, you know, cause I'm not supposed to be even talking to you now, that's up to you. And, and that's what I'm tell you right now. If you wanna go ahead and prosecute those guys, that's your choice. You know, if...

* * * * *

SYRE: Okay, if you, you know, if it goes to trial or whatever that happens; and, as long as you cooperate, you know, we're square with you and that's all we care about. You don't control the results, you don't control the D.A.

⁵ The following recorded statement by the appellant supports this conclusion:

SYRE: ... we got two choices; one is to go to trial, that's your's, the other is we can complete this deal, maybe we can sweeten it a little, maybe we can pay you more for dropping the civil liability, uh, but anyhow, the twelve-hundred dollars is, is fixed, we're going to give you that, maybe we can give you a little more.

So, too, after receiving the initial installment of the civil liability settlement, on October 29, 1980, Gibbs signed a Release which stated in pertinent part:

I further acknowledge that the execution of this release concerns the civil liabilities for which I may hold the Union, its agents, and other parties to this agreement accountable. This release does not apply to any criminal proceedings nor does it place me under any obligation whatsoever to refrain from the prosecution of any criminal actions arising from the incident of June 27, 1980.

This evidence clearly indicates that the money given to Gibbs by the appellant was not in an effort to induce Gibbs to forgo criminal prosecution.

Statements, twisted and taken out of context from a tape recording which failed in many instances to capture every word and phrase, may be construed in a variety of ways. The testimony presented by both sides is demonstrative of this analysis. However, we find the evidence does not support the verdict beyond a reasonable doubt, that the appellant attempted in any way to induce Gibbs to testify falsely, to withhold testimony, or to allude legal process. Accordingly, we reverse the conviction and order the appellant discharged.⁶

REVERSED.

ROWLEY, J., files a dissenting opinion.

ROWLEY, Judge, dissenting:

I dissent.

My review of the record convinces me that the evidence is sufficient to support the jury's verdict.

⁶ The appellant raises a total of nine issues on this appeal, however, since we reverse based upon the lower court's refusal to grant a demurrer, we need not address the appellant's other contentions.

First, I note that Gibbs testified that the reason he decided to proceed with the prosecution, in spite of having agreed to drop the charges in exchange for the payment of \$1,600.00, was that he was having a "hard time" at work and the union was "playing around with the money that they promised." (N.T. 140). I find no support in the record for the proposition that Penn Radio "prevailed upon" Gibbs not to drop the charges.

Secondly, the fact that Gibbs indicated he has initially planned to drop the criminal charges is, in my opinion, immaterial. Gibbs' intentions are irrelevant. Appellant is the one accused of a crime and it is *his* intent that is on trial. The evidence shows that criminal charges were pending against appellant's clients and that appellant paid Gibbs with the intention that he drop the charges.

Third, it is true that in the various tape recorded conversations which were admitted into evidence appellant did not actually say that the money was being paid to drop the criminal charges. But it should be noted that the taped conversations took place one month *after* the money was first offered and accepted. However, on the tapes that were made appellant told Gibbs that Gibbs would have to personally talk to the district attorney in order to get the charges dropped. He then told Gibbs exactly what to say. Appellant later told Gibbs that if the district attorney refused to drop the charges and he was subpoenaed, he did not have to appear, although the Sheriff would be sent after him. *If* he was found, he would have to take the stand. Appellant then advised Gibbs how to change his story and still avoid a charge of perjury.

Finally, even without the tapes the evidence is more than sufficient, in my opinion, to support the verdict. Gibbs testified that on August 21, 1981, appellant gave him \$400.00 in exchange for his agreement to drop the criminal charges. (N.T. 132, 133, 2.64). He also testified that appellant told him he would be paid the rest of the money when the charges were

dropped. (N.T. 135, 2.63). The majority agrees that Gibbs' "version" of the incident was that the money was paid for withdrawal of the criminal charges. The question whether Gibbs' testimony should have been believed because it was not "substantiated" by the tapes raises an issue of credibility. As such, it is, in my opinion, better left to the fact finder. The jury chose to believe Gibbs rather than appellant. Since it is within the sole province of the jury to pass upon the credibility of witnesses, *Commonwealth v. Davis*, 466 Pa. 102, 351 A.2d 642 (1978), I would affirm the judgment of sentence.

APPENDIX C

COURT OPINION

Pennsylvania Supreme Court Opinion: No. 1453 E.D.
Allocatur Docket 1985, Dated: November 10, 1986, Rever-
sing jury finding and reinstating sentence.

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

No. 1453 E.D. Allocatur Docket 1985

Commonwealth of Pennsylvania,
Appellant,
vs.

Richard Syre,
Appellee.

ORDER

PER CURIAM

FILED: NOVEMBER 10, 1986

The Petition for Allowance of Appeal is granted. Inasmuch as a determination of the instant appeal is dependent solely upon an assessment of the record, a decision as to the merits of the appeal is being rendered concurrently.

The appellee, Richard Syre, a lawyer, was found guilty by a jury of witness tampering. He appealed his conviction to the Superior Court, which reversed on the ground that there was insufficient evidence to support the conviction (Opinion by Cirillo, J.). An appeal was taken to this Court, and, finding the evidence to have been clearly sufficient, we reversed and remanded so that the other grounds asserted in the appeal could be reviewed by the Superior Court. *Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985). On remand, the same panel of the Superior Court once more set aside the conviction and remanded for a new trial (Opinion by Cirillo, J.), holding that

there had been improper and prejudicial communications between two jurors and the court crier during the course of trial. *Commonwealth v. Syre*, ____ Pa. Super. ____, 501 A.2d 671 (1985). Once again, the Commonwealth has sought our review. A review of the record reveals that Superior Court has plainly disregarded the evidence supporting the trial court's findings that no prejudicial communications had occurred, and, thus, reversal of Superior Court's order is required.

Upon learning from an alternate juror, one Idolo Capriotti, that the trial court's crier, Helen Wolf, had communicated with two members of the jury during trial, appellee requested a hearing on the matter. At the hearing, Capriotti testified that he had been told during the trial by Barbara Guarracino (juror #8) that Wolf advised her that if she listened to certain taped conversations, which were the Commonwealth's chief evidence, it should only take five minutes to reach a guilty verdict; and by Amy Eskild (juror #11) that Wolf had told her that every person who asks for a jury trial is guilty. Guarracino's testimony was plainly contradicted, however, by the testimony of Guarracino and Eskild. Both of the latter testified that the content of their conversations was not as Capriotti had indicated.

Guarracino testified that she did not recall having had any conversation with Capriotti that could have been interpreted in the manner that Capriotti had asserted. Further, Guarracino stated that she had become depressed during trial because she did not like being separated from contact with her family, and that, as a result, she had asked Wolf how much longer the trial would continue. According to Guarracino, Wolf replied that if the jurors paid attention to the evidence, it should not take them long to decide upon a verdict. Guarracino testified that Wolf did not indicate what type of verdict might be reached, and, further, Guarracino stated that her ability to be a fair and impartial juror had not been influenced in any way by conversations with Wolf.

Eskild testified that she had initiated a conversation with Wolf that was merely a broad discussion of the entire jury system, and that, in the course thereof, they discussed generally the circumstances in which jury trials are conducted. According to Eskild, Wolf told her that, as a rule, jury trials are requested by defendants in criminal cases rather than in civil cases, and that people who are guilty might be one of the types of people that request jury trials. Eskild testified, however, that she did not recall Wolf ever having said that every person who asks for a jury trial is guilty. Furthermore, Eskild stated that her ability to serve as a fair and impartial juror had not been affected by contact with Wolf.

Finally, Wolf testified that she had in fact had a conversation with Guarracino in an effort to allay Guarracino's concerns about being sequestered from her family during trial but stated that, although she urged Guarracino to be attentive during trial, she did not tell her that the defendant was guilty or that it should not take long for jurors to reach a decision in the case. Further, Wolf testified that she had never had even a general discussion with Eskild about the jury system, and stated that she never had said that persons who request jury trials are guilty.

Based upon this testimony, the trial court found that no prejudicial communications had occurred between Wolf and the jurors, and, thus, that a new trial was not required. See *Commonwealth v. Bradley*, 501 Pa. 25, 459 A.2d 733 (1983) (new trial required only where communications incurred a reasonable likelihood of prejudice). It is established that, in reviewing a trial court's findings as to whether prejudicial communications have occurred, an appellate court is limited to a determination of whether the trial court's findings are supported by the record. See *Commonwealth v. Silver*, 499 Pa. 228, 241-242, 452 A.2d 1328, 1334-1335 (1982). The testimony in the present case, as heretofore recounted, supplied an ample basis for the trial court's findings. Superior Court's decision overruling those findings must, therefore, be reversed.

Order reversed, and judgment of sentence reinstated.

Mr. Justice Larsen files a Dissenting Opinion.

Mr. Justice Zappala files a Dissenting Statement and would hear argument.

DISSENTING OPINION

JUSTICE ROLF LARSEN FILED: NOVEMBER 10, 1986

I dissent and in support thereof cite the Superior Court opinion filed in this case authored by Judge Vincent A. Cirillo, *Commonwealth of Pennsylvania v. Richard Syre*, ____ Pa. Super. ____, 501 A.2d 671 (1985).

DISSENTING STATEMENT

JUSTICE ZAPPALA FILED: NOVEMBER 10, 1986

I dissent. I would afford counsel the opportunity to both orally present its position and to indicate from the record those factual matters which would sustain their position.

APPENDIX D

COURT OPINION

Pennsylvania Superior Court, No. 2248, Philadelphia, 1982, 501 A.2d 671 (Pa. Super., 1985) Dated: November 29, 1985, Reversing Trial Court for official interference with jury.

F. Fitzpatrick, Jr., Philadelphia, for appellant.

Eric B. Henson, Asst. Dist. Atty., Philadelphia, for Co., appellee.

Before ROWLEY, CIRILLO and CERONE, JJ.

CIRILLO, JUDGE:

Appellant was convicted of witness tampering. The Superior Court, 322 Pa.Super. 416, 469 A.2d 1059, found the evidence insufficient to support the conviction and reversed. The Supreme Court, 507 Pa. 299, 489 A.2d 1340, found the evidence sufficient and reversed the Superior Court. The case is now before us on remand to address the remaining claims. One of appellant's contentions is that the jury which convicted him was improperly influenced. We agree and therefore reverse and remand for a new trial.

Testimony from the jurors themselves revealed several significant contacts between court officer Helen Wolf and members of the jury. Initially, we must pass upon the propriety of such juror testimony. It is true that as a general rule, a juror may not impeach his verdict after the jury has been discharged; a juror is not generally competent to testify to what went on in the jury room. *Commonwealth v. Sero*, 478 Pa. 440, 387 A.2d 63 (1978); see also *Commonwealth v. Fuller*, 336 Pa.Super. 507, 485 A.2d 1197 (1984); *Commonwealth v. Boden*, 337 Pa.Super. 108, 486 A.2d 504 (1984). However, as our Supreme Court went on to explain in *Sero*, *supra*, this general rule does not app-

ly to cases like the one before us: “[W]e have carved out a narrow exception to the cannon of “no impeachment,” allowing post-trial testimony of extraneous influences which might have affected the jury during their deliberation.” (Citations omitted). *Commonwealth v. Sero*, *supra* 478 Pa. at 448, 387 A.2d at 67.

The alternate juror, when asked about a statement made to him by one of the other jurors, responded: “She told me that a court officer, Helen Wolf, had stated to her that a person who asked for a trial by jury is guilty.” Another juror related a separate incident:

I said, “Helen, you know, how much longer are we actually going to be here? You know, when we were sequestered, the Judge made a remark about three or four days.” I said, “Tomorrow is going to be the fifth day and if Mr. Syre is not done already, we are going to be here for the weekend and into next week and it’s just too much not being able to see my family and all.”

And Helen kind of comforted me. That’s when she gave me the statement when we were walking down the steps, “Look, if everybody paid attention and listened to the tapes, it shouldn’t take you long to make up your mind.”

This incident was related back to the alternate juror, who further testified: “Well, she told me that Helen Wolf had told her that deliberations should only take five minutes (because) he’s guilty.” Additional testimony revealed that the jurors discussed among themselves their uneasiness about Mrs. Wolf’s comments.

The Constitution of this Commonwealth specifically entitles an accused to an impartial trial jury. Article 1, section 9, as amended. The Sixth Amendment to the U. S. Constitution, via the enabling clause of the Fourteenth Amendment, confers the same right. *Commonwealth v. Cornitcher*, 447 Pa. 539, 291 A.2d 521 (1972). Indeed, no right is more fundamental to the

American justice system. *Philadelphia Newspapers, Inc. v. Jerome*, 478 Pa. 484, 504, 387 a.2d 425, 435-36 (1978), *cert. denied*, 443 U.S. 913, 99 S.Ct. 3104, 61 L.Ed.2d 877 (1979) (citing U.S. Const. Amend. VI; Pa. Const. (art. I, §9); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973); *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). Thus, when an accused is denied a fair trial because of jury partiality, even the most minimal standards of due process have been violated. See *Cornitcher*, *supra*; *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1965). See also *Witherspoon v. Illinois*, 391 U.S. 510, 518, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968); *Turner v. Louisiana*, 379 U.S. 466, 470-72, 85 S.Ct. 546, 548-49, 13 L.Ed.2d 424 (1965); *cf. Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

Before us is a situation wherein extra-judicial information reached the jurors *after* they were sworn. Unlike those instances in which damaging material reaches the jury before trial, that which comes to the jury's attention during trial is not subject to the voir dire screening process. Unless it is immediately brought to the court's attention, such information is not subject to cross-examination or a curative instruction, and the declarant cannot be confronted. As a result, a stringent standard of review is essential. It is the only way to avoid a violation of due process rights. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966); *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892); *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978).

As our Supreme Court recently re-affirmed in *Commonwealth v. Elmore*, ____ Pa. ____, 494 A.2d 1050 (1985), the applicable standard lies midway between a requirement that any ex parte contact requires reversal and a requirement that actual

bias must be shown. In other words, we look only for a "reasonable likelihood of prejudice." *Commonwealth v. Bradley*, 501 Pa. 25, 459 A.2d 733 (1983). Of course, if we do find a reasonable likelihood that the error contributed to the conviction, such error cannot be deemed harmless. *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). It is incumbent upon the Commonwealth to prove beyond a reasonable doubt that the error was harmless. *Commonwealth v. Elmore*, *supra*.

When the subject matter of the ex parte contact with the jury is somehow related to the case before them, such "reasonable likelihood" of prejudice is automatically found. As the Supreme Court held in *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954):

any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, *deemed presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. (Emphasis added).

See also United States v. Myers, 626 F.2d 365 (4th Cir. 1980); *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980); *Sullivan v. Fogg*, 613 F.2d 465 (2d Cir. 1980); *United States v. Fleming*, 594 F.2d 598 (7th Cir.), *cert. denied*, 442 U.S. 931, 99 S.Ct. 2863, 61 L.Ed.2d 199 (1979); *United States v. Moten*, 582 F.2d 654 (2d Cir. 1978); *Government of the Virgin Islands v. Gereau*, 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976); *United States v. Brasco*, 516 F.2d 816 (2d Cir.) (per curiam), *cert. denied*, 423 U.S. 860, 96 S.Ct. 116, 46 L.Ed.2d 88 (1975); *United States v. Ferguson*, 486 F.2d 968 (6th Cir. 1973); *Ellie v. Oklahoma*, 430 F.2d 1352 (10th Cir. 1970), *cert. denied*, 401 U.S. 1010, 91 S.Ct. 1260, 28 L.Ed.2d 546 (1971).

We hold that in the case *sub judice*, this presumption of prejudice simply cannot be overcome by the Commonwealth. The evidence, which overwhelmingly demonstrates that a representative of the court discussed the accused's guilt with those who would ultimately decide his fate, went beyond a likelihood of prejudice to an outright showing of actual prejudice. In a factually similar case (bailiff talking with jurors), the United States Supreme Court in *Parker v. Gladden*, *supra*, concluded:

The official character of the bailiff — as an officer of the court as well as the state — beyond question carries great weight with a jury. We believe that the unauthorized conduct of the bailiff “involves such a probability that prejudice will result that it is deemed inherently lacking in due process.” *Estes v. Texas*, 381 U.S. 532, 542-543, 14 L.Ed.2d 543, 549, 550, 85 S.Ct. 1628 [1636] (1965).

Virtually every jurisdiction has adopted *Parker's* view that such outside interference is in violation of due process rights. See and compare *Willie v. Maggio*, 737 F.2d 1372 (5th Cir. 1984); *United States v. Dean*, 667 F.2d 719 (8th Cir. 1982); *Fortenberry v. Maggio*, 664 F.2d 1288, 1292 (5th Cir. 1982); *United States v. Bruscino*, 662 F.2d 450, 458 (7th Cir. 1981); *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980); *United States v. Moten*, 582 F.2d 654, 661 (2d Cir. 1978); *United States v. Doe*, 513 F.2d 709-711 (1st Cir. 1975); *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973); *Gafford v. Warden, U.S. Penitentiary, Leavenworth, Kansas*, 434 F.2d 318 (10th Cir. 1970); *Alford v. State of North Carolina*, 405 F.2d 340, 343 n. 7 (4th Cir. 1968); *Lacy v. Gabriel*, 567 F.Supp. 467 (1983), *cert. denied*, ____ U.S. ____, 105 S.Ct. 195, 83 L.Ed.2d 128 *affirmed* 732 F.2d 7; *Tobias v. Smith*, 468 F.Supp. 1287 (W.D. New York 1979); *United States ex rel. Spero v. Wenzel*, 397 F.Supp. 597 (E.D. New York 1975); *United States v. Dioguardi*, 361 F.Supp. 954 (D.C. N.Y. 1973); *United States v. Driscoll*, 276 F.Supp. 333 (S.D. New York 1967); *Brummitt v. State*, 44 Ala.App. 78, 203 So.2d 133 (1967); *Wamser v. State*, 652 P.2d 98 (Alaska 1982); *People v. Hogan*, 31 Cal.3d 815, 183 Cal.Rptr. 817, 647 P.2d 93

(1982); *State v. Brigandi*, 186 Conn. 521, 524, 442 A.2d 927, 937-938 (1982); *Oliver v. State*, 25 Md.App. 647, 650, 334 A.2d 572, 574 (1975); *Commonwealth v. Hunt*, 392 Mass. 28, 465 N.E.2d 1195 (1984); *State v. Holly*, 350 N.W.2d 387 (Minn.App. 1984); *Crowe v. State*, 84 Nev. 358, 441 P.2d 90, 93 (1968); *State v. Mann*, 112 N.H. 412, 297 A.2d 664 (1972).

When such interference is found, the courts almost uniformly demand that the verdict be set aside. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966); *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954); *United States ex rel. Tobe v. Bensinger*, 492 F.2d 232 (7th Cir. 1974); *United States v. Brumbaugh*, 471 F.2d 1128 (6th Cir. 1973); *United States v. Gersh*, 328 F.2d 460 (2d Cir. 1964); *Wheaton v. United States*, 133 F.2d 522 (8th Cir. 1943). See also *Jenkins v. United States*, 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965); *Snyder v. Lehigh Valley R.R. Co.*, 245 F.2d 112 (3d Cir. 1957); *United States v. Pittman*, 449 F.2d 1284 (9th Cir. 1971).

Only last year we re-asserted our duty to uphold the sanctity of the jury trial:

[It] is imperative that we promote public confidence in our judicial system by vigilantly protecting the integrity of our jury system. "*Trial by jury presupposes that the jury works in a controlled environment untouched by any influence other than that properly permitted by the trial judge.*" *Hobson v. Wilson*, [737 F.2d 1, D.C. Cir. 1984]. To safeguard zealously this controlled environment, we must see to it that "each juror enters a case impartial, and throughout trial remains uncontaminated by outside pressures." *Id.*; Code of Professional Responsibility EC 7-29. We must take every "precaution against evil communication which may corrupt [the jury]." *Mix v. North America Co.*, [209 Pa. 636, 645, 59 A. 272, 274-75 (1904)].

Colosino v. Pennsylvania Electric Co., 337 Pa.Super. 363, 369, 486 A.2d 1378, 1381 (1984). Given the court officer's flagrant violation of these principles in the case before us, the verdict cannot stand.

Reversed and remanded. Jurisdiction is relinquished.

APPENDIX E

SETTLEMENT AGREEMENT

August 23 and September 22, 1980, agreement in principle between Ezekiel Gibbs, consenting agent, and Teamsters Local No. 115, executed by Petitioner, Richard Syre.

RELEASE

THIS AGREEMENT ENTERED this 23rd day of August, 1980, between Ezekiel Gibbs and Teamsters Local 115 herewith acknowledges that the said parties have agreed in principle to the terms and conditions of a complete and unreserved waiver by Ezekiel Gibbs of all claims against Teamsters Local No. 115 and other parties for the payment of sixteen hundred Dollars (\$1600.00). Ezekiel Gibbs hereby acknowledges the receipt of a check drawn on the funds of Teamsters Local No. 115 in the amount of four hundred dollars (\$400.00) as partial payment of said sum. Teamsters Local 115 agrees to pay the balance of twelve hundred dollars (\$1,200.00) upon the completion of the agreement and the performances of any promises hereunder.

For Teamsters Local No. 115	Ezekiel Gibbs
/s/ R. Syre (SEAL)	/s/ Ezekiel Gibbs (SEAL)

Received from Teamsters Local 115 \$400, 9/22/80 on account.
Balance of \$800.00 owing.

/s/ Ezekiel Gibbs

APPENDIX F

SETTLEMENT AGREEMENT

October 29, 1980, final agreement between Ezekiel Gibbs, consenting agent, and Teamsters Local No. 115, executed at Teamsters Union Hall in Philadelphia, Pa.

RELEASE

KNOW ALL MEN BY THESE PRESENTS, that I, Ezekiel Gibbs, of Philadelphia, Pennsylvania, of my own free will, as well for and in consideration of the sum of Sixteen Hundred Dollars (\$1,600.00) to me and hand paid by International Brotherhood of Teamsters Local Union No. 115, its officers, agents and members, Penn Radio Cab Company and its officers and Fred Tittle, Mike Kirk, Lewis Walker, Ken Stanford and Leonard Jones, at and before the sealing and delivery hereof, the receipt whereof I do hereby acknowledge, as for diverse other good causes and valuable considerations, have remised, released, quit claimed and forever discharged, and by these presents, for myself, my heirs, executors, administrators, and assigns, do hereby remise, release, quit claim and forever discharge the said International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and all of agents and members, Penn Radio Cab Company and its officers, and Fred Tittle, Mike Kirk, Lewis Walker, Ken Stanford and Leonard Jones, and all of their heirs, executors, administrators and assigns, and every one of them, of and from all, and all manner of action and actions, cause and causes of action and actions, suits, debts, dues, duties, sum and sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, agreements, promises, variances, damages, judgments, executions, claims and demands, whatsoever in law or equity, or otherwise howsoever, which against the said International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local Union affiliates, Teamsters Local Union No. 115, its officers and Fred

Tittle, Mike Kirk, Lewis Walker, Ken Stanford and Leonard Jones I ever had, now have, or which I, my heirs, executors, or administrators hereafter can, shall, or may have, by reason of any matter, cause or thing whatsoever, and particularly from all liability, claims, cause and causes of actions, judgments, etc. for any damages or injury to my person or property arising out of any incident of June 27, 1980, at Germantown and Lycoming Avenue, Philadelphia, Pennsylvania, or arising out of any other activity associated with or related to any dispute of any kind between Teamsters Local No. 115 and Penn Radio Cab Company.

I enter into this Agreement and Release freely and voluntarily. No person or party has made any threats of any kind to me or used any restraint or coercion to force me to execute this Agreement and Release. I understand fully well by that the execution of this Agreement and Release I am giving up any claim against any of the parties referred to herein, and I recognize that I am receiving compensation in a fair and proper amount for the execution of this Release.

I further acknowledge that the execution of this Release concerns the civil liabilities for which I may hold the Union, its agents, and the other parties to this agreement accountable. This Release does not apply to any criminal proceedings nor does it place me under any obligation whatsoever to refrain from the prosecution of any criminal actions arising from the incident of June 27, 1980.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 29th day of 1980, 1980.

/s/ Ezekiel Gibbs (SEAL)

Witnessed by:

/s/ James E. Smith, Jr.
October 29, 1980
2:45 P.M.

APPENDIX G

TRANSCRIPTION

September 22, 1980, tape recording no. - 033 of
Philadelphia District Attorney, Case No. 80 - 474
Transcription by Detective Peter Toniazzo.

Conversation between Ezekiel Gibbs, consenting agent,
and Teamsters legal counsel Richard R. Syre at City Hall,
Philadelphia, Pa.

Unknown: I thought I say Zeke gone in there

Gibbs: Hey, how you doin' Rick

Syre: Good to see ya'.

Gibbs: Ah, man

Syre: Been havin' a little trouble uh, roundin' up these guys
here. But, uh, but, uh, but, uh, they should be by any
minute to speak to em'. The judge isn't here yet, so,
uh, uh, I'll um, talk to you in a minute about this
thing.

Gibbs: Okay.

Syre: It'll probably take a little while, but hopefully...

Gibbs: Well, I just ran up those elevator steps.

Syre: You wasted your breath man, 'cause you're still gon-
na have to wait...

Gibbs: Alright.

Syre: We'll go over thing in a minute. I got, I got
everything with me and hopefully we'll get it done to-
day.

Gibbs: Okay.

Syre: I got my fingers crossed.

- Gibbs: That sounds good, that sounds real good.
- Syre: Just have a seat here but...it's in 416, now don't don't wander...
- Gibbs: Which is 416, oh, right over here? Oh, okay.
- Syre: Alright, we went in there and we set this thing for trial date of December 15, okay. Uh, the D.A., uh, won't drop the case, okay. He won't drop it. Now, uh, it's up to you what, what you want to do. Uh, I have here, uh, the check. This...this check, (unreadable) the check I have is...is for settlement of your civil...what we call your civil claims against the union. You sign an agreement. It's all, uh, you know a matter of public record. Nobody's trying to hide anything. And, uh...that's...
- Gibbs: So I'm gon' get from you, what?
- Syre: That's all...
- Gibbs: That's (unreadable)
- Syre: Here it is, okay? Uh, this is...I can't give this...I'm not authorized to give this to you today because we can't...we can't get settled.
- Gibbs: But I was gonna do what I was supposed to be doing anyway. aha, aha.
- Syre: Yes, that's right. Okay, now, here's, here's what we'll have to do, If you want to get it settled, we'll you know, we'll give you the money as quick, as quick as we can, we can...
- Gibbs: But see, Rick, Rick, you keep puttin' me off, man?
- Syre: No, I'm not putting you off. Listen, I don't... I don't want anything more than to get, than to get this thing settled. Listen...(unreadable)

Gibbs: That's it, you know.

Syre: Well, what do you want? What do you want? No you're not a dumb man. What do you want? What would you like?

Gibbs: I mean you said...

Syre: Just, just...

Gibbs: Now this is September 22nd. Ya'll been puttin' me off and puttin' me off, I mean...

Syre: No I'm...

Gibbs: I know...I know, I don't have... I mean, that's... that's so much money.

Syre: What do you want, what do you want?

Gibbs: How come you all..I done sign that, that...

Syre: You can't. I'm not going to have you sign something because I can't give you the money. I can't give you the money even if you, you know, even if you wanted to sign it, I can't, you know, I can't do it. Let me suggest something. Okay?

Gibbs: Y'all are jivin' me Rick.

Syre: Well, I, I know you, uh, you feel that way, but, uh, let me, uh, let me make some suggestions to you. Uh, in order for us to, to drop...we have to go to trial on the 15th. In order for us, to, to, to get it cleared up, and get the criminal thing dropped you, ha...on your own, have to go, uh, and, uh, the name of the district attorney there is a guy by the name of Charlie Klein, okay?

Gibbs: Charlie Klein?

Syre: Klein, Now you have to remember, in order for you, you, you personally to be able to communicate with

the District Attorney's Office you're gonna have to remember that the matter was held today in court room 416, okay...

Gibbs: Yeah.

Syre: ...and, that Charlie Klein is the District Attorney. Now you're gonna have to talk to Charlie Klein. If you, if you want to drop it, you're gonna have to talk to him.

Gibbs: Yeah, but I mean, well, ya'll must be planning on giving me some more money or somethin'.

Syre: Well, we might be able to do that because of the complications...but...

Gibbs: Cause see, ya'll, ya'll, ya'll put me off and put me off and put me off and now I gotta...

Syre: Well...

Gibbs: ...go see some district attorney.

Syre: Yeah. Well, I told you it'd be, it'd be problematic. Let me, let, here's, here's the two choices we got right now, okay, and I never said it'd be simple. I told you it might drag on and, and, uh and if there's somethin' I can do to make it, tide you over, well, we'll have to talk about that privately, away from here, you and I, but, uh, let me, uh, let me, uh just tell...

Gibbs: Now see, I don't, I don't put...just like I told Yeoman, I have this debt I got to pay now. I done put the man off, I gave him that...

Syre: How much you have to pay him?

Gibbs: I, I got to give him one thousand dollars today. I have to give him one thousand dollars today.

Syre: Well...

Gibbs: You understand? Now I got to tell the man, "Listen man, I ain't, and I, I do not have the money." You understand what I'm saying?

Syre: Well...you know...

Gibbs: Now, I mean, I can't personally, personally I can't...

Syre: I can't do, I can't do anything about that...

Gibbs: Boy I'll tell you, ya'll make it hard on a man.

Syre: Well, let me, let me just tell you what, what the situation'll be if, if, we can't settle this thing between, uh, you know, if you...In other words if you want to back out now, let me tell what the situation is, okay? And then we'll discuss what we can do to, to get the thing done. Number one.

Herman Bloom: Hey Rick, I'm gonna shove off.

Syre: Okay Herman, I'll be in touch with you and call you when I get back.

Herman Bloom: Ok, you know...

Syre: Yeah, I'll get in touch with (unreadable). Now, uh...

Gibbs: See, I, I, I ain't no fool, I mean I been seeing what's going on down. It, it must be something awful damn big for "you" to keep going on...

Syre: Have you, well, you've been, you've been involved, it is, it's a very, it's a serious, it's a serious charge, it's a very serious charge. They got these guys held up on, on, on God knows, they got each one... them is charged with five offenses okay? Theft, assault, conspiracy, you know, they're throwing the book at 'em. They're throwing the book at 'em because this, this isn't just not an ordinary arrest. You work for Slot-sky, okay...Slotsky...

Gibbs: I work for Penn Cab.

Syre: Okay, wait, hold on, hold on..

Gibbs: I work for Penn Cab.

Syre: Let me, let me, let me...

Gibbs: If I worked for Slotsky...

Syre: Let me explain why it's a complicated thing...

Gibbs: You know what I mean? Ya'll, see ya'll misconstrue the whole thing from the gitgo. I wasn't a busted unioner from the git go I'm not, you know, (unreadable)

Syre: Forget that, we're not, just forget that. Let me tell you why it's so complicated.

Gibbs: See, they called me...

Syre: You know, you know who Dick Sprague is, the attorney, you met him.

Gibbs: Who?

Syre: Dick Sprague, you met him, don't you, didn't you?

Gibbs: I don't, I ain't too good on names anyway, I don't...

Syre: Well, you, do you remember, you, you, uh, I don't know if, I think the paper said you were down there at the law firm, I'm not sure. But the attorney that represented Penn Radio Cab, is a guy by the name of Dick Sprague.

Gibbs: Oh, the little short guy, I remember now.

Syre: Yea, yea, older guy, Now he was the former District Attorney, okay? Just a couple of times before the one they got now. He was the former, uh, Chief Assistant District Attorney. He's a very powerful

man. He, he, he represented Schwartz, you know, the guy in ABSCAM, that trial they just had. He's the attorney, he's a very powerful man in this city. And when he says something's gonna be done, it's gonna be done, alright?

Gibbs: But you see...you, you're...

Syre: Now you're caught up in that. You're a little guy, I'm a little guy, we're both caught up in that.

Gibbs: Yea...but the thing about it...I'm countin' on ya'll for one thing...and...

Syre: Well you can still count on us but I, I, you know...

Gibbs: Yea, but okay, you keep...

Syre: I told you...did I ever tell you...did I say it'd be settled for sure? I said, I hoped, right? I said, I hoped it would...did I ever mislead you on that?

Gibbs: Well, the, the letter said as of the twenty-second when, when the final thing is supposed to jump off, I supposed to be get the twelve hundred dollars.

Syre: I got, yea, I got the twelve hundred but the final thing...

Gibbs: Well the, then that letter that you gave me...ya'll falsifying ya ownselfes.

Syre: No, no, no...

Gibbs: Come on Rick, you got me...

Syre: Well let me see what the letter says.

Gibbs: Yeah, read the letter.

Gibbs: Now see, I was thinking Ya'll would hold up to ya'll part, your end of the bargain. I break my back comin' down here, ain't had no money from the git go. Yeah, check it out...

Unknown: Hey Rick, Fred (unreadable)

Syre: Pardon?

Unknown: Fred...Tittle...

Syre: Oh, Fred is, yeah...Is he there? Okay, he'll just have to wait a while, okay, have a, have a...just stand around a little.

Gibbs: Now, see that Right there, it says the twenty-fifth day, Aug...well, that's the, that's the day that we did it on the twenty-third.

Syre: "upon completion of the agreement the performance of any promises" (unreadable) I didn't, I didn't say the twenty-second. But listen that's besides the point. I told you verbally, what I told you verbally is I hope we can get it done on the twenty-second, okay. I hope it's all finished and we'll close the deal now and I'll, we'll pay you and, uh, and you'll sign that agreement releasing us of civil liability, and then that's all there is to it, okay. But the District Attorney, the one in there. I talked to the District Attorney and he says, "no. I, I don't care what Gibbs says, we're not dropping the case." Alright? So, that's where we're stuck. Now, we got, we got two choices, Zeke. Listen one is to go ahead with the trial on the fifteenth, and that, that means there's no use you and I talking anymore, okay. The other thing that is going to have to happen, if you want to drop the case on your own, if you want to do that, uh, now let's put the, the money in the, let's put the money aside for a minute, because I know you got a problem there. But if you want to drop that case you're gonna have to talk, you're gonna have to talk to Chuck Klein there. I'm gonna leave...

Gibbs: Oh, okay, gimme um, you, you know...you know his phone number and all that stuff?

Syre: Well, he's right in that room there, Chuck Klein. Now I...listen I...

Gibbs: You gon' point him out to me?

Syre: I can't...I can't go...I'll point him out to you but I can't be involved in that, you know, cause I'm not supposed to be even talking to you now, that's up to you. And, and that's what I'm telling you right now. If you wanna go ahead and prosecute these guys, that's your choice. You know, if...

Gibbs: Okay, if I go up...if I go up to...Okay now

Syre: (unreadable) Now you

Gibbs: We doin' this between us right now. Hey look, I need some money bad. (unreadable) I got to give the man somethin'. Can't you call somebody. If I go up to Charlie Klein now, while he in the court room, I, mean, this is how, I'm desperate right now, you understand what I'm saying, I got to give the man somethin'.

Syre: Okay, you know

Gibbs: I mean like, I had counted on the twelve-hundred right.

Syre: I, uh I tried to tell you, you know that couldn't be sure, you know but...I try to do something for you. I can more easily promise to sweeten the deal then I can promise to give you money today.

Gibbs: Oh boy, this is a predicament. This is a predicament. Ya'll got me. Ya'll got me by the balls.

Syre: Well, let me, let me finish what I have to say and then then, uh, I, I'll try to help you on the other thing as much as I can. Uh, we got two choices; one is to go to trial, that's yours, the other is we can complete this

deal, maybe we can sweeten it a little, maybe we can pay you more for dropping the civil liability, uh, but anyhow, the twelve-hundred dollars is, is fixed, we're going to give you that, maybe we can give you a little more. But, the only way that can happen, is before December 15th, uh, you know...

Gibbs: But I'm saying, I'll got to Charlie Klein now if you, if you would, if you would (unreadable)

Syre: But I can't do it to you honestly. I'm not, I'm not gonna tell you as much as I wanna do this, I can't say I can give you...John Morris is, uh, uh, not in town, and I, uh, have to...I could maybe raise a hundred bucks. It's gonna come right out of my pocket.

Gibbs: (Garbled) I ain't even ready to go back up town now.

Syre: Well, let me explain what has to be done and then we'll about the other thing. If this thing is gonna be dropped, if you wanna drop it, you gotta talk to Chuck Klein and say, "Look, I don't wanna these guys, I work with em, nobody's threatened me, nobody's mishandled me or anything else like that and, but, uh, I just want to drop the case." Chuck Klein's gonna say to you. "You can't, we won't let you do it."

Gibbs: Well how they gon' stop me and tell me what to do?

Syre: Well that's what they're gonna do. They're gonna really put the pressure on you and tell you what to do and then you're gonna say, "I'm doing that of my own free will." And then they're gonna sit down with you and say, "Now is anybody threatening you?" "Has anybody threatened to beat you up, anybody pay you any money?" All that. Now...

Gibbs: Well they, they can say what they wanna say.

Syre: Alright, but if you say "Yes" to those, then uh, you know, you know, they're...they're gonna probably go after you and us.

Gibbs: Go after me?

Syre: That's right. Well, if you say you took, you took money, yes.

Gibbs: No, I...

Syre: They're not gonna go after you if you say that we threatened to beat you up. If you say that you threatened...we threatened to beat you up, they go after us, not you, if you say, you...

Gibbs: But I'm, if I go up to him and just tell him I'm on my own free will that I wanna drop...

Syre: Yes.

Gibbs: That ain't nothin' they can do nothing to nobody.

Syre: That's right. That's you, that's up to you. That's your own personal feeling. You can do whatever...The reasons you give is "Look, I drive a cab, I work with these guys everyday, the thing was in the heat of a union thing. There was a lot of misunderstanding. It went a lot further than, uh...You know, the district attorney charging them with every damn thing under the sun, and I, and I wasn't, I thought that they charged them with simple assault on me."

Gibbs: I mean, I wanta know what to say, just eh...

Syre: "They charged them with everything and I want to, I want to be friends with these guys, I don't wanta be their enemies. Nobody threatened me." Now, then they're gonna, then they're gonna say, "Well you can't do it." And he's gonna tell you to go home.

Then you're gonna have to go down to the District Attorney and talk to Ed Rendell.

Gibbs: Who?

Syre: Ed Rendell.

Gibbs: (unreadable)

Syre: You know who Ed Rendell is?

Gibbs: Naw.

Syre: He is the District Attorney. He's the guy the voters put in office.

Gibbs: What have I got myself into. Just been beat up, boy. (unreadable)

Syre: I'm just...I'm just tell, tellin' you that you have to do that on your own. Now, understanding that, what can we do? The only thing I can (unreadable). May I can get that to you quick.

Gibbs: How quick, I mean, I got get the man somethin' to-day, I ain't gon' lie to you.

Syre: What, well, what, who is he? What does he, what does he want?

Gibbs: That's the, that's a personal problem.

Syre: Somebody gonna take, take it out on you, take it out on your flesh?

Gibbs: It's something I have to have, I got. Well, it's a long..another story behind that one too. I mean I got a personal life too, you know what I mean.

Syre: I understand that. But you know, I mean...this thing is so god damn difficult to handle and complicated. You know, you can't, you know, you're adding another thing, uh.

Gibbs: But see, okay, I'm tellin' you now, I had saw my way out, right; okay, when I talked to Joe, when he first started this, I said, well I had to have the money then.

Syre: I got you four hundred bucks.

Gibbs: Did you?

Syre: I stuck my neck out on that.

Gibbs: But I gave...

Syre: You're already four hundred dollars (unreadable) if you decide, if you decide, uh, if you decide...

Gibbs: Then...

Syre: Just to say the heck with it...

Gibbs: That's the reason I (unreadable)

Syre: ...We're out four hundred bucks.

Gibbs: Look, I already went...I went, I took, I turned around and...

Syre: Alright...

Gibbs: ...I signed this...

Syre: Alright listen, I told you at the time Zeke, I told you at the time, I, I was gonna put some up front and trust you; we don't do that. The way we are, we don't do that, but I told John, "I believe the guy, he needs the money." So we got you four hundred bucks. That money is in your pocket, that's yours and nobody's gonna ask you 'bout it. Nobody's going to raise any question about it. Okay. And we gotta go to trial on the fifteenth, and either you're there or not. Now.

Gibbs: December 15th, I gotta wait, uh...

Syre: You don't have to wait that long...

Gibbs: Um, well, what, okay, by me going to Charlie Klein and tell him that, then that money is mine then right?

Syre: Well, uh, now let me...

Gibbs: I'll be done, do my share of the part, my, my part.

Syre: No, let me, let me, let me be clearer to you. I don't want you to operate under a misconception. I don't wanta lead you on. I told you what, what Chuck, Chuck Klein will say. He'll say, "No." and you'll have to go down and explain it to his supervisor. You got to do that, you gotta carry it all the way through. it's not just...

Gibbs: I gotta tap dance and all that.

Syre: You gotta do a lot of tap dancing, right.

Gibbs: And I'm the one that got my ass wuped.

Syre: Yea.

Gibbs: Boy, that don't even...

Syre: Well listen, I, I, all, all I can say Zeke, is, is, uh, you'll either go to trial on the fifteenth which we don't wanna do, we don't wanna do it, but that's what we're up against, because it's all based on your willingness to cooperate. The only problem I can see you have, Zeke, in this, on, on the way you're approaching it, is when you do all this, you're trustin' us and we got to give you that money cause you're gonna, you're gonna be in a situation where you do it all and then you're still not gonna have the money.

Gibbs: I did that.

Syre: Now you wanna talk about that? That's somethin to talk about. Because that, that's a legitimate concern of yours. The other shit you're bullshittin' me, but this you've got a problem, right. Now whatta you

want us to do on that score. Because the time
(unreadable)

Gibbs: But if I go to Charlie Klein and go to whoever the un,
head District Attorney is and do all of that

Syre: Right

Gibbs: ...and I still...

Syre: Don't have money yet.

Gibbs: ...don't have no money...

Syre: Yeah, that's right.

Gibbs: And then I gotta wait for December the Fifteenth..

Syre: No, you don't have to wait then, 'cause we'll know
when they dismiss it. They'll do it.

Gibbs: Just, okay. Well how would you know if they not
gone dis...say, just, like you said, they not gon
dismiss it on, on, on...

Syre: Because the D.A. won't, the D.A. probably won't tell
you. But he'll tell Herman Bloom, that attorney
there by Friday "we'll, we'll dismiss the charges" and
they'll do it before the fifteenth. Now there is a
chance, I don't wanna..you know...

Gibbs: Okay.

Syre: You know, again, there is a chance they won't do it
till the fifteenth. God, I hope not, but, uh...

Gibbs: Okay, that's what I'm saying, if I'm gonna go to, uh,
Charlie Klein and, uh, Rendell, okay, and he still
don't do it; now see what I'm saying, they still don't
do it, then I, that means...

Syre: Well, we'll, we'll...

Gibbs: I still don't get no, (unreadable) my money?

Syre: We'll, we'll give you, we'll give you, uh, we'll pay you to release the civil liability. I give you my word on this. No matter what happens. Alright? No matter what happens. If you, if you do that, no matter what happens, we'll, we'll pay you before the fifteenth, okay? I mean we, I can't say anything else about them because you can't control that. You're doing your share, uh, and uh...

Gibbs: Ah man, I'm just...

Syre: Well, let me, let me ask...this

Gibbs: I got a lot on my mind.

Syre: Okay, let me ask you this. Uh, of ya, Gibbs, can't pay you the whole thing, okay? Maybe we can pay you part of it, just, and you just gotta do whatever's required period. And when it's all over then we'll pay you the rest.

Gibbs: Rick, it ain't, it ain't..

Syre: How about that? How about if I give you six hundred bucks, uh, today or tomorrow, or you know as soon as I can get it worked out?.

Gibbs: Okay.

Syre: Alright?

Gibbs: Uh, okay. I, I wish there was some way you could work it out. I tell you man...

Syre: Well, I don't want, I want, you know, listen, I want, I don't wanta, I don't wanna sit around and argue with you and you say you don't trust me. I'm gonna, I'm gonna do whatever you wanna do here. I'm, I'm, I been completely honest with you.

Gibbs: (unreadable) try

Syre: What d'ya want?

Gibbs: Will you try to do something for me?

Syre: What d'ya want?

Gibbs: Try to do something for me.

Syre: What d'ya, six hundred dollars, right?

Gibbs: Give me somethin', I don't care if it's hundred dollars, give me somethin' man, you know what I mean? I, I'm tellin' you, I can't go to that man and tell him today that I don't have no money and I, I got one dollar in my pocket now and that's for bus fare to get back up town. Can't you do somethin'?

Syre: I'll get to you. I'll get. I can get you four hundred dollars today, in a check.

Gibbs: Okay.

Syre: In a check, I can't give you cash, it'll be a check.

Gibbs: Any, any, he'll take..look, he'll take anything.

Syre: You can't give him a check, you gotta give, you gotta cash the check.

Gibbs: I gotta cash it?

Syre: Yes.

Gibbs: Well, where do I have to go to cash it?

Syre: You can probably cash it at IVB bank. That's where we do, that's where we bank.

Gibbs: Well, is there anyway that you can call a certain bank? I mean call...

Syre: No, they'll cash it right away.

Gibbs: They'll cash it? Without me having, uh, a bank account in there?

Syre: Yes. Because it's our check. Let me check. It's not your check, it's ours. Well, let me, let me uh. Industrial Valley...they should, but do it early enough. Alright here's what we'll, we'll do. You tell me and, if, if, if this, this is fair and you'll you'll go along with us on the thing.

Gibbs: Hey, I went this far with you.

Syre: I will go, I will go, I'll go get four hundred bucks. I'll give you a four hundred dollar check and you do not have to sign anything or do anything for it, okay?

Gibbs: I'm going, I'm going to see Charlie Klein now.

Syre: Yes, I'll just, I'll just completely trust you. You go in and tell Charle Klein that your, you must tell him now, again I have to trust you. You didn't talk to me.

Gibbs: You'll see me in there talking to him.

Syre: I'm not going to be around, for that. Uh, but you must tell him that you didn't, you weren't talking to anybody, you know, you're not..you know, you're not, none of this what's going on went on, get it? If he asks that, you say, uh tell him "...I want to drop it because I work with the guys, that, uh, Dick Sprague got ahold of this thing and threw the whole, and threw the whole god damn book at them. I wasn't hurt that bad and uh, I, I know a lot of the guys personally and, uh, I want out, you know, I, it's just too it's just too far exaggerated, it's blown way out of proportion. I don't want to be a part of that, of railroading these guys because of my employer."

Gibbs: Okay.

Syre: Alright?

Gibbs: I'll go in there and tell him right now. Is that the room he's in right now?

Syre: Yea. He's right there now.

Gibbs: I mean, is he...

Syre: (unreadable)

Gibbs: In court, not just in there, you know what I mean?

Syre: Yea. Right. Now, he's probably sittin' there. You'll have to wait until they're, they're between cases.

Gibbs: Yea.

Syre: Then you have to say, "Mr. Klein, say, you're the district attorney, are you the district attorney, I'm the victim in that case (unreadable)...your, your, your story should do two things. "The thing is blown way out of proportion, these guys, I work with them. I, I didn't want to go in the union, they did, and my, my boss pushed it way out of proportion, he's trying to nail those guys, and, uh, I don't I don't want to be a part of this type of thing."

Gibbs: Okay.

Syre: Now, I'll, you, I'm gonna go back to my office, okay. I'm gonna have the check drafted for four hundred dollars. You call me. If you don't go through, somethin' like that, or somethin' else, don't worry, you know, I'm a, I'm a busy person and I don't have anything else on my schedule, if I do, I will inform the person that answers the phone and you ask for Rich Davis, okay?

Gibbs: Rick Davis?

Syre: Rich Davis.

Gibbs: Rich Davis?

Syre: And he will know wherever I am if something happened, he know that (unreadable) and I will then get

in the car and I will meet you, uh, wherever you want to be met.

Gibbs: About what time?

Syre: Well, I'm gonna go and just get it done as fast as I can. That's the only thing I'm gonna do. So you talk to him, get your four hundred bucks and then..

Gibbs: What about twelve, is Twelve-thirty too soon?

Syre: I'll shoot for twelve-thirty. All it is, is me gettin' down there and going to where you wanta meet me.

Gibbs: Okay, where you, what...

Syre: Where do you wanta meet me? You want me to go there and meet you here?

Gibbs: Well, want me, uh...

Syre: Where you gonna go after this?

Gibbs: Well, I was gettin' ready to go back up town, but, I mean...

Syre: Up town where?

Gibbs: Back up, well, back up towards, I was goin' to go to the job and (unreadable)

Syre: Alright, you want me to meet you at work?

Gibbs: Well, you can meet...I tell you what..

Syre: Well, I'll do this. I don't like to sit and wait.

Gibbs: Okay, me neither.

Syre: I will meet you here.

Gibbs: Alright, right here?

Syre: Uh, yea, I'll meet you, uh, I'll meet you, I'll take you to work, okay?

Gibbs: Okay.

Syre: Drive you to work.

Gibbs: Okay.

Syre: And, and, but I don't want to park and run around. I wanta meet, meet you and I want you sitting some where where I can pick ya up and then I'll take you to work.

Gibbs: Well, I, I, um, cause see, man, I got a dollar in my pocket, I'll go, go back up town and change my clothes...

Syre: I'll take you wherever you want to go.

Gibbs: Well, I mean

Syre: Take ya, I'll take you by your house, take you to Penn Cab wherever, I'll pick you up here..

Gibbs: Okay.

Syre: ...and, and then I'll drive you wherever, wherever you want to go.

Gibbs: Okay, well then I'll here and wait for, uh..

Syre: Now where do you want me to meet you when I pick you up?

Gibbs: Uh, I'll be right, right here, here in front of City Hall, that alright?

Syre: Okay, now you give me uh, a call and when you're when you're (unreadable)

Gibbs: Yes, that's what I'm sayin!

Syre: Okay, you give me, you give me a..I'll tell you where, you know where that Horn, ah, wait a second, I want to pick you up where I can get in and out fast. Uh,

uh...Well, I'll tell you where I'll meet you. You know the corner out there, uh, by the bank, Bell Savings and, that corner over there (unreadable).

Gibbs: Oh Lord! Oh, shit.

Syre: Okay, pick a place you know, and, you, you know if you can sit outside under a tree and wait. Cause you're going to be waiting a half an hour for me to drive.

Gibbs: Okay. I'm tell you where. I'll meet you at, uh Seventeenth and, uh, Market, that's the best place.

Syre: Alright, Seventeenth and Market.

Gibbs: Seventeenth and Market.

Syre: And you, you uh...

Gibbs: Right in front of the Greyhound.

Syre: Yea, yea. You give me a call in a half an hour, okay? You need a dime for that? You need a dime for that?

Gibbs: Well, I got a dollar like I said.

Syre: Here's a dime.

Gibbs: Yes..

Syre: Well, the reason I'm doing this is because I, you know, I, I don't, I got too much to do, I don't wanta be fucking around waitin' an hour wondering where the hell you are.

Gibbs: I'll be right, I'll be in front of the Greyhound bus station at 12:30.

Syre: Now that Seventeenth and Market, alright?

Gibbs: Seventeenth & Market.

Syre: It takes me half an hour to get home. You give me a call in about a half an hour, okay. You tell me exactly what you said to him. Don't tell him anything about what we said, (unreadable)

Gibbs: Alright. Won't even mention...

Syre: Just say you don't want to see these guys rail roaded (unreadable) you know, it wasn't that bad, uh, then, now, if he says, Well did they do it? Well you say, Well, you know, you know there was some exaggeration in there. Say, I don't want to talk about it.

Gibbs: (unreadable)

Syre: There's some exaggeration and feelings we are very high and then, uh, you call me and, uh, I'll meet you there at the corner and I'll give you a check for four hundred dollars and then we'll...uh. Now, you gotta promise, now, you're gonna, you're going go through this again, cause you're gonna have to do it. I'll give you a ride, give you a ride there, do whatever it takes to, to help you do it and to finish it off. But I mean I can't be..you know, it might take two or three times, Zeke, and then I don't wanna have to...pay \$400.00 (unreadable).

Gibbs: Well see, then I just have to, all I have to do, all I have to do, if I can give them four hundred...I can work up, get the rest of it, you know, I can get the rest of it by the weekend.

Syre: Well we might be able to get it all done by this weekend too, you know.

Gibbs: Well, I'm cause I'm damn sure gon sit here and wait for...but you gotta show me who he is first.

Syre: Oh, okay, yeah.

Gibbs: Is stanford in there yet?

Syre: I'm gonna go in there and then sit and you come in after me. I don't wanna walk in with you, okay?

Gibbs: Alright.

Syre: And I'll just be sitting over there. I'll meet you over there.

Gibbs: Okay.

Damn, don't ask me, just like I got through tellin' Rick, I was borrowing somethin' on my part, and they ain't doing nothing.

Syre: Zeke, listen Zeke, he's the only guy in there, he's talking to the officer right now. He's got glasses and he's in a brown suit...so there's no, nothing going on in there. So uh, he's the only other white guy in there. But, uh, he's uh, he's just standing there, okay, talking to a policeman. Give me a call.

Gibbs: Okay.

APPENDIX H

TRANSCRIPTION

September 22, 1980, tape recording no. — 034 of Philadelphia District Attorney, Case No. 80-474, Transcription by Detective Peter Toniazzo.

Conversation between Ezekiel Gibbs, consenting agent, and Teamsters legal counsel Richard R. Syre at 17th and Market Streets, Philadelphia, Pa.

Syre: What happen?

Gibbs: I don't know what ya'll got me into. I went and did what...what's his name, the smart guy that we was talking to in the courtroom.

Syre: Klein?

Gibbs: Yea. They talkin' bout they might prosecute me.

Syre: Yea. I told you they'd put the pressure...Let's sit over here. You want somethin to eat?

Gibbs: I'll take...I'll take a coke, right quick.

Syre: So what did they, ah, what did he say?

Gibbs: He said I put him through all the trouble taking (unreadable) behind my (unreadable). Me prosecuting the guys, you know, and he said that I was going to drop it out of the clear blue sky and I told him that is what I want to do, and that's...

Syre: Uh-huh

Gibbs: what I was going to do.

Syre: Uh-huh, what did they say?

Gibbs: So he gave me, uh, a card and said well he was going to subpoena me to a court anyway.

Syre: Well he'll subpoena you on December...on December 15h.

Gibbs: I told him, I said that's what you are going to have to do, that's what you gonna have to do.

Syre: Uh-huh. So that's where it was left, huh?

Gibbs: That's where it left, I just left, I just left out of there.

Syre: Who did you, who did you talk to, Klein, who else?

Gibbs: I talked to, and, ah well, what's that big guy's name you was standing next to?

Syre: The only one I know of is Chuck Klein the guy that I, excuse me, it was in the other place.

Gibbs: The big guy, he's a big guy. You called his name.

Syre: Ed Rendell, you talked to him personally?

Gibbs: I went in, into his office.

Syre: So that now, I want you to describe the office to me, is it a **big office**?

Gibbs: Well, it's I guess it was his office.

Syre: Well, I mean you know he's the D.A. so it got to be a big office I mean.

Gibbs: Uh, his office is...so big.

Syre: Like anybody else's.

Gibbs: Yeah, I mean I ain't been all...

Syre: Probably wasn't Rendell then but maybe...

Gibbs: Uh-huh.

Syre: Could have been...

Gibbs: Calling his name, you know, he was a big heavy set dude.

Syre: He is big, yeah, Ed Rendell is heavy.

Gibbs: (Unreadable)

Syre: Yeah. Bald on top.

Gibbs: I saw him, I saw him, him and Chuck. I told, uh, I was talking to him and I told him the same thing. I said "Look this is what I wanted to do." I said, "I'm me and I'm getting ready to quit my job."

Syre: Did they ask you if you were paid off?

Gibbs: I ain't, I ain't doin nothin.

Syre: Did they ask you, did they ask you, what did you tell them?

Gibbs: I told them "No." I said, "I'm gettin tired of all this junk, I am getting ready to jump that bail, I'm gettin, I'm getting ready to split." "They can do what they want to do," I said. That's what I told him as a matter of fact. I just told him he could do anything he wanted to do. I said, "I'm, I'm dropping out."

Syre: Did you tell em, any exaggeration there, anyhow?

Gibbs: Uh, you know, I uh...

Syre: You know, I gotta, I gotta know where we are at you know.

Gibbs: I told him, I said, I'll tell ya when you're ready to take me you still gonna take me back up the way?

Syre: I'll take you wherever you want to go.

Gibbs: Drop me off so I can call the guys, call Jim. I told him to meet me at the bar.

Syre: Where do you want to go?

Gibbs: Right, right where I live at, ah, Broad & Christian.

Syre: Broad and Christian?

Gibbs: Clearfield.

Syre: Oh, Clearfield.

Gibbs: I'm going to change clothes and take my behind to work. I got to get some money. I tell you boy if I knew, if all this business was involved... God damn. I get scared as hell being in a spot like that.

Syre: Well, hey, they are going to pressure the shit out of you. I told you that they, they want to nail us. They got orders from, ah, from ah, you know. Sprague, who has a lot of power.

Gibbs: Well what do he got to do with it? What is happenin Rick? Well, you tell me.

Syre: Well you know, we're, we're the Teamsters right and they're trying to, you know, nail us wherever they can. We go in, ah, we organize these places and, ah, they don't want to be organized, and they make payoffs to the politicians and, ah, the politicians do what they wanna do. We get in a little trouble and, ah, they, they try to bury us. See, we're fighting for those five guys. I don't, you know, I, I, know you're, you're not friends and I don't expect you to like them, but you know, we fight for the little guy. We try to get a bigger pay and it, you know, you are just fighting all the time... they'll beat, beat you to death. Okay, let's sit over here. Can't get in there, only place to sit.

Gibbs: Let's sit over here.

Syre: I want to sit where you can write. Here, over here. Why don't you sit? Oh, it doesn't matter.

Gibbs: No, well, I'll sit here, I'm dirty, what the hell, I've got jeans on.

Syre: It's dirty too, though. Alright, I've got cash here, okay. Why don't you count it? It turned out to be easier to, to give you cash. I'm not supposed to give you cash, you know, I want a record of the transaction. You don't, you don't have that thing I gave you, do you?

Gibbs: That letter?

Syre: Yeah.

Gibbs: When they stole my bag, they stole the letter.

Syre: Who stole what, where?

Gibbs: They stole my bag from up the garage out of my cab. I had my cab parked, you know, getting ready to gas it up and take it out and... somebody took my bag.

Syre: So you don't have that anymore? Alright, ah, now, so where it's at now. They said they would subpoena you, right?

Gibbs: Yeah, they said un, whenever the court date is that I had to ah, while, they would subpeona me for.

Syre: All I gotta say, ah, you know our, our agreement is, that you must cooperate.

Gibbs: I told you, I told you I would do that.

Syre: Okay, if you, you know, if it goes to trial or whatever that happens, and, as long as you cooperate, you know, we're square with you and, and that's all we care about. You don't control results here, you don't control the D.A. you know. We want your cooperation, we need you cooperation, we, we playing with the big guys here.

Gibbs: Okay, well, Rick, now when am I going to get the rest of the money?

Syre: Well, what I'm, what we are going to do is somebody is going to contact the D.A. for us, okay. John Morris will call the D.A. up, alright, say why won't you drop the case. You gotta understand the politician. The D.A. is just playing John, the D.A. knows John always wants something. Okay, so, he's gonna play him up, get what he can from him.

Gibbs: What I want to know is...

Syre: So what is going to happen is the D.A. is going to say, ah, well, I want to subpoena the guy and he's gonna probably bullshit us. He might say things, uh, you know, Gibbs really wants to go through with it, or he's scared, or he told us he's scared, he wants to do that, you know, you can't trust the guy. This is where the problem gets in. He might say to him, Gibbs said this, then John Morris jumps on me and says, hey, that guy's playing both sides of, of the middle. Some point down the line, you know, you got to, you got to take a side.

Gibbs: Yeah, I talked about that.

Syre: You want them, you want, you want to get the thing settled (unreadable).

Gibbs: I want, I'm tired, I'm tired of this shit man. I mean...

Syre: I'm telling you this, that we want, we wanta get it settled but I would be misrepresenting it to you if I told you that it was going to be done tomorrow or in the next day. You know exactly what is going on now because you lived through it. You heard what I had to say, you heard what the D.A. had to say. The D.A. told you in there, he's gonna do everything he can to force you... Still this...

Gibbs: But they can't do that, they can't, can't, ah...

Syre: They can't force you, no.

Gibbs: They can't, and I won't be wound, and I can't, I would be the one wind up, the one going to jail just behind me dropping the charges.

Syre: You didn't do anything wrong.

Gibbs: Uh, well, you see I mean...

Syre: The only thing the D.A. is doin see, the D.A. can't, can't force you to do anything. Here's, here's, you can talk to another lawyer if you want, but you know, that's up to you. But here is, technically where you're exposed okay, is perjury. That's what you have to look at and I'm talking to you as a lawyer.

Gibbs: Gosh sakes, if I just drop the charges?

Syre: That's not perjury.

Gibbs: Well then, how is it going to be perjury?

Syre: Where you're exposed is, if they force you to testify and you contradict a statement that you gave, now you got what we call "exposure". Alright? That is where you, that is the only, that is where you need a lawyer's advice. Where it gets so complicated.

Gibbs: Are you going to represent...?

Syre: I, I will do this, I will, I won't do it cause I'm on the other side. But I will make sure you get to talk to another attorney or any attorney of your choice.

Gibbs: What is that for?

Syre: To explain to you what's happening.

Gibbs: Yeah, well, somebody got to do something.

Syre: Yeah, well that is what I am saying, you gotta, you gotta, you gotta, my only, my only objective here is to

get the thing settled. I am not interested in seeing those other guys that beat you up get put in jail. They're gonna do heavy time on this, it was an uh, uh, an emotional thing, something to do with the strike, and it is being exaggerated and being used politically. If this were not political, I can go in plead them guilty to the damn thing, and they'd get probation. I'd say, "Yeah, they did it", no way, no way (unreadable) to keep you from joining the union but that is not what's going to happen to these guys. The D.A.'s got a hold of them, got a hold of your balls, he's got Sprague behind him and they're gonna, they're gonna hold these guys ransom because they want John Morris, and give [them] [him] two to three years in jail. So you know you don't have control over it either. It is a simple thing where they us would get treated like anybody else, then I'd say, alright they did it and they're gonna and they are going to get fined ah, \$300.00 a piece and spend a couple days in court and that will be it. So you know you, you're just a client.

Gibbs: What can I do?

Syre: There is nothing you can do, Zeke, I am being honest with you, they said, alright (unreadable). In all honesty, I am not feeding you a lot of bull shit and I don't want you to be left high and dry on this thing when it's over. What will you get in your problem legally, is when you get on the witness stand and you start to testify and they have a signed statement under oath and then you start saying other things, that is where you have exposure now. The way you handle that is to, you know, a lot of this is a matter of memory, you are not committing perjury when you say, "Well, I don't recall that, I don't recall this and ah, you know I, ah, you know, well, I called the guy a name first." You didn't say anything, you didn't say

anything about it until now, until now, just forgot. When you say, "No, it didn't happen, I lied when I was talking to myself", then that's perjury, you can't say that, you can't say "I lied". All you can say is that I didn't, I didn't tell the complete thing. You know, I was emotional", and uh, the fact of the matter is Zeke they're taking it, it's all getting way out of hand, way exaggerated and they are going to use it for their purposes and you're going to use it for your purposes. So if you want to get the thing settled and you wanted to be compensated for your, for what happened to you and the only fair thing is to do everybody's off the hook, you're happy, we are happy, you, and what interest does the D.A. have for five black guys in jail. You think he cares about those guys, you think he cares about you?

Gibbs: Well I tell you, long as he cares for the guys who did it, what that did to me. Long as they care about like going around with somebody else's teeth in my mouth. But I don't want to see...

Syre: I know how you feel, that is why we owe ya, we owe ya and ah, we're going...

Gibbs: Ah, this day is getting more complicated as you go along.

Syre: Well, it ain't gonne get simpler, it ain't gonna get simpler.

Gibbs: Boy, I tell you, what a man has to go through, just to survive.

Syre: Well, I tell you, you are going to have to talk to the D.A. again and you might have to convince him that you changed.

Gibbs: What?

Syre: And then you are going to have to ah, you gonna have to ah, if he said "Well, I'm going to subpoena you", you know, you don't necessarily have to appear to that subpoena.

Gibbs: They can't do nothing to me?

Syre: They can't do nothing to you, all they can do if you don't appear is issue a warrant for you, okay? They will call, they'll issue a warrant for you, they'll issue a warrant for your arrest. It is not your arrest, what it is, they send out the sheriff and the sheriff picks you up and brings you to trial. And then at that point, at that point you gotta, you say alright now you got to take the stand. There you're in their clutches. You gotta do it. Cause if you don't do it, then you're in contempt.

Gibbs: But if I'm not here?

Syre: If they can't find ya (unreadable)

Gibbs: They can't do nothing to me? Yea well...

Syre: I'm just telling you like it is.

Gibbs: Okay, I tell you this is one hell of a day to start off a week.

Syre: Hell of a day, you know, you got to, you got to stick to this all the way. It is going to be hard as hell and complicated. For you to be safe, okay, your position should be that the thing is grossly exaggerated and they charged them with everything in the book. Now for instance, who took the money. There is no proof of who took the money. You didn't never say you saw it. You never even been out with one of those guys.

Gibbs: All I just say is told them is...

Syre: . . . Right, and ah, well, you know, I'm not in honest, in all honesty you, to you cannot go there and say "I lied" because I'm not telling you to do that. That's where you have trouble, I lied. You know what you said, you know where you exaggerated a little bit or you left some things out, that is an entirely different story, or your memory, ah, you know, you were mad at the guys and angry and you know it was five guys there. Were they those five, you know you have to identify them. You have to pick them out of the book. Your recollection could be, well, you know. For instance, I'll tell you something for a fact, Leonard Jones wasn't even there.

Gibbs: Yes he was.

Syre: He tells me he wasn't there.

Gibbs: If I don't remember nothing else

Syre: You know the five guys?

Gibbs: I know the five guys.

Syre: How bout, how about Lavon Moses?

Gibbs: Moses?

Syre: He was there.

Gibbs: If he was there I did not see him.

Syre: You know Lavon?

Gibbs: I know Moses, and if he was there, I didn't see him.

Syre: Well, Lavon was there and, and, uh, Leonard was not.

Gibbs: Leonard Jones, him and Teacher opened up the door on the right hand side. We're talking about the one that was — had his hair in braids this morning?

Syre: Ummmh.

Gibbs: Him and Teacher was the one who opened up the door on the right hand side.

Syre: Alright.

Gibbs: And I leaned over to, well, we don't have to go through all of that.

Syre: We don't have to go through that, but I was just saying that, that ah, you know your memories are imperfect. The fact of the matter is that you didn't know who those guys were very well and you went and identified them, okay? But the point, the point is, I'm saying that to protect you. I'm not saying that to argue with you, I'm saying that to protect you, what we want, what we want, a draw, we want for you just have tell the D.A., Mr. Rendell, that "This thing is grossly exaggerated out of proportion with extreme pressure with Mr. Slotsky and his attorney, you know, and they pulled out all these books and I identified them and I wasn't that sure at the time, and they forced me. They kept saying well is it this guy or that guy, they gave me all kinds of pictures and I gave them the guys that looked like them, and I can't say for sure those were the right guys, there were seven guys there. I could only identify five, I could not be sure of them. I don't want, you, you know, the thing is grossly out of proportion." If they say, "Well did you lie about it?" No, I told the truth, I didn't lie about it, but I mean, I was under, I was under pressure to, to identify all the guys and I left out some of the thing that I did, some of the things I said, I left out cause I was under pressure." That's all you have to remember, okay?

Gibbs: I tell you boy this is enough to give a man an Excedrin headache.

Syre: Yeah, I know even we got one.

Gibbs: Well, since I don't have a copy of, ah, this letter, I thought you said I didn't have to sign my name, but I guess I do.

Syre: Well, I'm giving you cash and this is my money and I'll give you a, I'm going to give you a check, two checks for \$400.00 or \$800.00 but you're going to sign one back to me and I'll three checks, er, two checks, one for 800 and, uh, let's see, one check for 800.00 and one for 400 and you keep the 800 and give me the 400 because I'm going to give you cash or let's see, says here, received \$400.00 on account balance of \$800.00. Okay?

Gibbs: Is there anyway I can get a copy of this again since I'm going to pick up, they got that additional thing on there? Just for the record?

Syre: Well yeah, I'll give you, ah, I can copy it for you. This is for settlement of the civil claim. If you're ever asked, it's for the settlement of the civil action. You have a right to sue the union and you're giving that right up. A lot of this is on trust, you know?

Gibbs: I know. Rick, I told you what's happenin'. I told you what's happenin'.

Syre: Well listen...

Gibbs: You saved my life right now, man. When I go up there and get this for him I told him I had...

Syre: Well listen, that's the last time, don't count on it next time. I'm doing that because I'm taking your word for it.

Gibbs: Oh, next time I won't count on it.

Syre: That \$800.00, now that comes down on the thing when the thing is, is done. Although you know we'll be fair, you know we gonna be fair to you and one of the things, no matter what happens, we're paying you for the civil liability. Okay? So, no matter what happens you are going to get paid 800.00 bucks. But, you gotta, you know, what to, you got to cooperate with us.

Gibbs: I told you anyway. Now wait a minute now, you said, you told me you were going to try to get me, uh to sweeten the pot a little bit, I ain't forgotten it.

Syre: Well, you must trust me alright?

Gibbs: . . . I'm putting my trust in you and I want you to put you . . .

Syre: Well, don't worry about it, I'll give you a . . . I'll see you get a little extra, okay?

Gibbs: Okay. While I didn't tell them I'd be in until about 1:30. Good God almighty.

Syre: Well, you're playing with guys that play with knuckles and they play hard ball. You're not playing with a bunch of pansies. You're playing with some very dangerous people. I don't like it either, I'm like you are, I'm stuck up in it. Hey, listen, you're better off that it drags on a little bit.

Gibbs: Why, uh?

Syre: Well, it gives you time to feel things out and see where everybody is at. You gotta know what kind of people you are dealing with. See, we're honorable people, we're kind of rough, but we keep our word. Your best bet is to stick with us.

Gibbs: I didn't know I had to . . .

Syre: Stay on the job.

Gibbs: I didn't know I had to go through all them changes today but (unreadable)

Syre: Listen, you are a working man, you, you got to understand that, you are a working man, you, you don't, you, you get involved with the boss, Morris Slotsky, and his attorneys and all that bull shit, it's problems man, they don't care about you. They're going to use you for their purposes then you are going to be right back to where you were, stuck with your own guys, your own kind, that's the lesson you learn on the fuckin picket line.

Gibbs: Well...

Syre: And, you know at some point you got to say, well, I learned a lesson. You know, you're coming out of it, **you may be breaking even.** I certainly wouldn't want to lose a couple teeth, but...

Gibbs: All I want...

Syre: At least you're not, you're playing it fairly well, you know you're getting your thing up, a you know don't push you luck on it either because like I say when you're fighting with somebody it's, it's better, better to stay in close, right?

Gibbs: But the thing about it is, Rick, I mean is all this done blew up on me, all I wanted to do was just go to work, do my job get off and that is it.

Syre: Well, that's right, I, I can understand that, but you know there were 95, 98% of the people were out there and they said, well, we got to keep the strike up. Slotsky said that if I could get four, five or six people to drive cabs I'll break it. So five guys can, in fact break the will of 95% of the people and that's where it gets rough. I been through it many times.

Gibbs: Yeah well, all I wanted to do is go there and get me a cab to drive and I didn't know it was going to lead to all of this.

Syre: Well, like I say, Zeke, you got to let by gones be by gones. We're, we're gonna be fair, you're going to be a member of the union. I think you already are, you got, ah, you got, you paid some dues, I think.

Gibbs: Well...

Syre: When we get the contract you know you'll be a member and, ah, you got to live with those guys. But those guys, you know you gotta let those guys, those guys, you got those guys by the balls. Eventually you got, you got to let by gones be by gones. You had it out, you had a fight.

Gibbs: One sided.

Syre: True a stalemate, well sure one sided, you're getting the thin and thick. I think everyone of those guys would give a couple of teeth to get the, this worry off their back. I know at least three of them would. I mean, they're getting strung up for how long. So I mean you are kicking them in the balls pretty good. The point I'm just making is this. The thing is over with, the fight, strike, is over with. You're dealing with Slotsky, were buddy, buddy with Slotsky. You know we're slapping him on the back and he's trying to get a good deal for us on a contract. Where do you stand in all of that? Man, you're just pushed aside. The only thing that you got is, you got, you got five of our guys by the balls on this and we need your cooperation.

Gibbs: Oh I'll tell you...

Syre: And you know we are kinda married that way you gotta, you know we gotta hang ourselves out. You

hang yourself out but it's like a big family. We're family, we're union people. We are union members and you don't let outsiders come in and solve family problems. You know, when you have children, you don't let somebody come in and knock your children around. You think for them that's that's your business in a way we're like that you know. We can't, uh, survive attacks from guys like Rendell. Man, that guy wants to score points with our enemy. He wants to hold John up, you know he wants to do John a big favor. He wants to build this thing up so ah, it's, it's a big favor for John, you understand? It's all in his hands. If you go in there and you did your thing and then Rendell is going to hang it out so he can look like he's the big shot. So he can get all the credit.

Gibbs: Excuse me, so I'm sort of like a pawn, huh?

Syre: Right now you're a pawn, yeah. Because if you had your druthers, Rendell would have said alright, we'll drop it and they would of signed the papers there and then, they would have been all over and then you would of been out of and you would of had your ah money and everybody would have been happy, right. But Rendell wants to hold it up.

PORTION OMITTED BY STIPULATION OF COUNSEL

Syre: Okay Zeke, give me a call if anything comes up, alright.

Gibbs: Okay, now how I'm, I going to get the copy of that, that form, since I'm...

Syre: What do you want, I'll give a, I'll give you a receipt for all of that if you want.

Gibbs: Okay.

Syre: It really doesn't matter you know cause ah, I mean you got your money so we're the ones that want the receipt.

Gibbs: Yeah, well, I just want to make sure that I don't be the one wind up going to jail.

Syre: Yeah, alright I can give you a copy of the, of the ah, final settlement you know, give me a call, alright. I got to find a phone, ah, just give me a call, ah, we got to arrange for you to probably have to talk to the D.A. I don't know, you...

Gibbs: Well, they said...

Syre: I'll be in touch with you now don't get out of touch.

Gibbs: Okay, thanks a lot Rick, take care now.

APPENDIX I

TRANSCRIPTION

September 26, 1980, tape recording no. C — 042 of
Philadelphia District Attorney, Case No. 80-474,
Transcription by Richard R. Syre, Defendant

Telephone conversation between Ezekiel Gibbs, consen-
ting agent, and Teamsters legal counsel Richard R. Syre

Voice: Local 115

Gibbs: This is Gibbs here, did Rick get in yet?

Voice: I don't know. I'll check.

Syre: Yeah, Zeke.

Gibbs: Yeah, Rick

Syre: Yes

Gibbs: Hey, man, I'm glad I got a hold of you.

Syre: Yeah, what's up.

Gibbs: They been getting on my back something fierce.

Syre: Who?

Gibbs: (unreadable)

Syre: Who?

Gibbs: Klein

Syre: Who?

Gibbs: Klein

Syre: What? They calling you up?

Gibbs: Yeah. They, I got a bus load of problems. I'm sup-
posed to go in there Monday. And I'm trying to... I
was tellin' you about this loan, right?

Syre: Yeah.

Gibbs: Well, I was suppose to give him some money today (unreadable).

Syre: Ah, well, you know, ah, that's, ah, you know, ah, I, I can't I can't really, I'll have to talk to somebody to see what we can do, but, ah, don't do anything until ah (unreadable) Okay?

Gibbs: (unreadable)...I got to talk to somebody (unreadable)

Syre: Well, that's up to you. We're paying you, ah, we're we're making a deal to settle the civil liability. Ah, you're still at the ah, ah, you're still working there, right?

Gibbs: What? Penn Radio Cab?

Syre: Yeah

Gibbs: Yeah, I'm still working there.

Syre: Okay. You going to work tonight?

Gibbs: Yeah, ah... Well, I planned to.

Syre: Alright. Did you ever find your license, by the way?

Gibbs: Yeah, yesterday, in fact. You know at the Burger King?

Syre: ah huh

Gibbs: Where I was sittin' down, it fell down there, right where we were sittin'.

Syre: Oh, Good.

Gibbs: But, ah. See, what I'm going to have to do is I'm goin' to have to talk to somebody (unreadable)...got some problems (unreadable) I ain't got \$50.00 to my name (unreadable)

Syre: Well, look, We'll get together with you, Okay?

Gibbs: Yeah, but, I have to meet (unreadable) I have to be downtown at 10:00 O'Clock Monday at (unreadable) I got to go down there (unreadable)

Syre: Oh, they don't have you coming in Monday.

Gibbs: (unreadable)

Syre: What for?

Gibbs: They told me to come in. I had to be there at 10:00 O'clock (unreadable)

Syre: Well, you know, you'll just have to go. Ah, ah, I can't do anything. Ah, you know, I, you, you don't technically have to do anything until the day of trial at which time you have to testify, but, ah, you know, I would, if you have any doubts about how you feel or what to do, I would talk to another attorney.

Gibbs: He said (unreadable)

Syre: Well, you hold on a little while and we will see what we can do. But your putting another, you're making a demand on us and we can't, ah, we can't meet that demand. You're calling me Friday afternoon and telling me alot of things I'm not able to react to by Monday at 10:00 O'clock. I know the D.A.'s office doesn't usually take that kind of action at this time. I mean if they have you in there, ah, on Monday, ah, you can go in there and talk to them all you want. I don't know what...

Gibbs: Just in case they give me (unreadable)

Syre: Well, you know, they can't make you do nothing, you don't have to go in. Your not under any obligation to go in and, ah...you know ah, ah, I don't have any time to do any thing for you now and, and anyhow.

Gibbs: (unreadable)

Syre: You're going to be working there tonight, right?

Gibbs: (unreadable)

Syre: Okay, and, ah, I'll try to get back to you. I don't think there is much I can do at this point. You know we settled the civil liability up and...

Gibbs: (unreadable) I'm involved in this (unreadable) \$600 dollars (unreadable)

Syre: Well, you know, that's up to the D.A. If the D.A. is, is ah, going to pressure you, he's going to pressure you. I figured he would. You have to make up, you know, you make up your own mind as to what you want to do.

Gibbs: ...That's what I'm tellin' you. I got to have some money since I'm (unreadable) and you've given me 800 already (unreadable)

Syre: Well, that's for the, ah, civil claim, ah, ah you know We agreed to pay you 1200 to drop the civil liability, you, but you know, I thought that was it, but alright I'll talk to Mr. Dowarsky about it and I'll get back to you. Okay?

Gibbs: Okay. Well, you gonna have to get me (unreadable)

Syre: In the mean time, you know, if you have a meeting with Klein, you know, then, then, that's between you and Klein. You, you don't have to go to any meeting, you're not under any subpoena, you didn't get any subpoena, and, you know, if, if, if you want to go you can go. If you don't want to go you don't have to go. But between now and Monday, there's, ah, I can't do anything, you know, I don't have... It's Friday afternoon, some people, people are gone and I

don't have time to talk to anybody, and, ah, if you want to wait awhile and you want to talk to me again I'll be here on Monday. I'll be Tuesday and ah, ah, we can do that.

Gibbs: (unreadable)

Syre: Well, I'll get back to you, Okay? I don't fully understand what you are saying but I'll be in touch with you. Okay? You're still at Penn Radio Cab, right? And you're not going to quit that job are you?

Gibbs: (unreadable)

Syre: Okay, I'll be in touch with you shortly. Okay?

Gibbs: (unreadable)

Syre: Bye, Bye

APPENDIX J

Notes of Testimony in the Court of Common Pleas, First
Judicial District of Pennsylvania, Trial Division
Before Judge William Porter

Commonwealth v. Stanford, Kirk, Walker, Tittle
May Sessions, 1981 — CP — 8007-1536, Simple Assault, Agg.
Assault; 1537, Recklessly Endg. Person; 1538. Crim. Consp.;
1539, Theft, Unlawful Taking, Receipt of Stolen Prop.; 1540,
Robbery

TRIAL

MAY 29, 1981

Appearances: Charles Klein for the Commonwealth of Penn-
sylvania
Joel Rome, et al. for Defendants

Excerpts: Re: A.D.A. Parry's testimony about Teamster
surveillance on October 2, 1980, using Ezeikiel Gibbs
as a consenting agent, pages 251-252

[251] Q. Was there anything other than the meeting with Mr.
Syre, in which my name wasn't mentioned, Gibbs'
representation that someone had mentioned my name, and
the telephone call from your office by Gibbs to me; is there
anything else?

A. Yes.

Q. What was that?

A. Subsequent to the telephone call that Mr. Gibbs made to
your office, he called Mr. Yoman and inquired of Mr.
Yoman whether or not he was supposed to go ahead and
see you based on the context of the conversation he had
with you over the telephone.

Mr. Gibbs pointed out to Mr. Yoman that you didn't seem to understand what was going on, what had transpired between him and Mr. Syre and what the arrangement was supposed to be. Mr. Yoman said to Mr. Gibbs you must be talking that way, meaning you, Mr. Rome, because you were talking over the telephone, and he should go ahead and get the meeting and everything would be all right, and Mr. Yoman would come to the meeting with Mr. Gibbs on October 7.

- Q. So what you are saying then, based on Mr. Yoman's representation that I was feigning ignorance of the situation — you have a tape of the conversation, don't you, the first phone call between me and Mr. Gibbs?

[252] A. Yes.

- Q. Was it on Mr. Yoman's representation that I was feigning ignorance and wanted nothing to do with it, that you chose to believe Mr. Yoman and accordingly suspected me of complicity in subordination to commit perjury; is that correct?

- A. That is not my testimony. My testimony was that based on Mr. Yoman's statement, among other things; in addition to that, based on Mr. Yoman's statement that the reason you were talking the way you were talking over the phone was because you were on the phone, not that you didn't want to be involved in it, but you were talking the way you were talking over the telephone because it was a telephone, and that Gibbs should go ahead with the meeting and that it would be O.K., that Yoman would be there at the meeting in your office with Gibbs. Yes, I continued to have a suspicion of you, Mr. Rome.

THE COURT: Let's take a ten-minute recess.

(Short recess.)

BY MR. ROME:

Q. Was the conversation between Mr. Gibbs and Mr. Yoman recorded?

A. Yes.

APPENDIX K

TRANSCRIPTION

October 29, 1980, tape recording (Cert. No. 0088, 110 of Philadelphia District Attorney, Case No. 80-474)

Conversation between Ezekiel Gibbs, consenting agent, and Teamsters Business Agents Joe Yeoman and James Smith and Teamster Legal Counsel, Richard R. Syre, Petitioner.

Transcript of October 29, 1980, tape recording (Cert. No. 0088, No. 110 of Philadelphia District Attorney's Office, Case No. 80-474) made by Ezekiel Gibbs. Transcribed by R. Syre, September, 1985. Events were taped at Teamsters Local No. 115 union hall, 2833 Cottman Avenue, Philadelphia, Pennsylvania. Present at the meeting: Gibbs, Joe Yeoman (union business agent), Jim Smith (union officer and notary public) and Syre

Gibbs: Pretty nice here.

Yeoman: (inaudible) ... gonna say somethings for your legal benefit, Ok? So just...just so. I'm going to straighten your thing out. Ok?

Gibbs: What? Today? I like that. Ha, ha, ha.

Yeoman: Hey, Syre.

Gibbs: What's happenin'?

Yeoman: Rick and... Jimny (inaudible)

Syre: How you doin'?

Gibbs: (inaudible)

Yeoman: You're a hard guy to catch, man.

Gibbs: Well, my uncle died in Florida so I had ta... So they said they was going to have a family reunion while

they was up there too, so I stayed up there for a little while. I got back Saturday night.

Yeoman: Well, you come to me a couple days before, before the strike. You told me you was in pretty darn shape and you was hopin' we could settle...that case with ya. Alright, and I came back and talked to our people to see if it could possibly be done. And...a... everything was worked out if...on it...and a...I looked for you so we could, we could straighten the matter out but you was hard to catch up, I didn't know your uncle died, I'm sorry to hear that anyway. Ah...So now is this what the balance is that will take care of that?

Gibbs: Yea. Ha, ha, ha. Ah da. I could use this too.

Yeoman: Will that settle up the matter then?

Gibbs: Yea, sure will for me.

Yeoman: Please read this over so you can (inaudible) (copy of the October 29th settlement agreement)....

Gibbs: OK.

Yeoman: Now, so you understand the (inaudible) of it. The check is for the, you know, the damages you incurred and, and the problem which we don't take any personal, ah, blame for the thing but Reverend Shelton, you can thank him very much for interceding and trying to see that something is done right, cause he came, he came to your aid all the way (inaudible) with some kind of relief for your problem. And that's, that's what it's done for. Ok. It has nothing to do with the criminal matter that is going. We personally felt that something should be done for you after you made the request and Reverend Shelton interceded for you. And understand that that, ah, ...

Gibbs: Ok, Now...

Yeoman: That's part of it. Ok?

Gibbs: What about ah, Klein?

Yeoman: Well, the criminal matter is going to have to take care of itself.

Gibbs: Ok, supposin' I don't be here?

Yeoman: Well, I don't know what you are going to do as far as that.

Gibbs: But I'm just saying, you know, supposin' I don't be here? They can't, they won't be no reprecussions as whatsoever, right? I mean, if I don't show through when, whenever the fellows got to go.

Yeoman: Well, you gonna have to make your own judgment about your criminal case, you know. That's the thing.

Gibbs: Well...

Yeoman: Alright?

Gibbs: ha, ha, (inaudible) Yep.

Yeoman: Ok?

Gibbs: And ah...

Yeoman: You put the day...

Gibbs: Time...

Yeoman: What's the date?

Smith: Which one should I ... put in?

Gibbs: 29th? No its got the 30th.

Yeoman: (inaudible) 1980

Gibbs: Yea, got that now. I wrote down 1981. . . . Do I get a copy of that too?

Yeoman: I'll get, ah . . . (inaudible) . . . what time is it?

Smith: Sure 2:45 PM

Gibbs: Get your car fixed?

Syre: [nod]

Yeoman: Ok, I'm going to inform the Rev. that we . . .

Gibbs: Got me squared away? When, when we goin' back to work.

Yeoman: . . .that we settled up with ya. Huh?

Gibbs: When we goin' back to work?

Yeoman: We're tryin' to work out everything now. Should have a meeting in a couple, the the next couple of days, which ah.

Gibbs: This could be no better time my birthday next week.

Yeoman: Huh?

Gibbs: My birthday next week.

Yeoman: Oh.

Gibbs: He, he. . . . That's it?

Yeoman: Yea.

Gibbs: Ah, nice doin' business with ya, ha, ha, Joe. Take care. You too. . . . Yep . . . he, he, . . . Rick, take care. Ha, ha.

APPENDIX L

Notes of Testimony in the Court of Common Pleas, First
Judicial District of Pennsylvania, Trial Division Before
Judge Stanley L. Kubacki

Commonwealth v. Syre

July Sessions, 1981 - Nos. 2671, Hindering Apprehension or
Prosecution; 2672, Tampering with Witnesses and Informants;
2673, Hindering Apprehension or Prosecution; 2674, Hindering
Apprehension or Prosecution; 2675, Hindering Apprehension
or Prosecution; 2626, Tampering with Witnesses or Informants

Post Trial Motions

February 23, 1982

Appearances: George Parry for the Commonwealth of Pennsyl-
vania F. Emmett Fitzpatrick, Jr., for Defendant,
Syre

EXCERPTS Re: District Attorney misconduct in the investi-
gation of official interference in jury delibera-
tions. Intimidation of jurors.
pages 20 - 22 Comments of A.D.A. Parry

(Capriotti - Cross)

MR. PARRY: Your Honor, if I may be heard, it is the Com-
monwealth's contention that Mr. Capriotti is a disaffected alter-
nate from this jury, a man who did not like the use of electronic
surveillance by the Commonwealth.

This was just to establish his bias or prejudice — his bias in
favor of the defendant and his prejudice against the Com-
monwealth, since we used electronic surveillance here.

I think it is a matter to inquire into. Here we have a man who is placed under oath and asked on the voir dire whether or not he had any feelings about electronic surveillance that would make it impossible to serve as a fair and impartial juror. This man remains silent.

Not only did he remain silent, [21] but we will attempt to establish that after he became part of the jury, even though he was an alternate, he was with the jury during sequestration, he attempted to lobby about his views for electronic surveillance. He repeatedly brought these views up with other jurors.

I think it shows his bias in this case and I think we are entitled to inquire into it to establish just what kind of man we are dealing with here.

MR. FITZPATRICK: We are dealing with a man who heard two specific statements. We are dealing with post trial motions filed by my client.

We are not dealing with some general fishing expedition by the district attorney's office regarding Mr. Capriotti's ability to serve as a juror. We are dealing with his direct testimony about two things that he heard from two jurors and [22] that is all we are dealing with in the post trial motions.

I have tried to indicate that both to Mr. Parry and to the Court, as far as the scope of what I am concerned we are here to deal with today.

If there are any other charges that the district attorney wishes to bring against Mr. Capriotti or myself or my investigators, bringing them, sir, in a forum. But we are here today to deal with one issue, did this or did this not occur and if it did should my client have a new trial.

THE COURT: This is a very sensitive thing and I think we should hear everything.

APPENDIX M

Notes of Testimony in the Court of Common Pleas, First
Judicial District of Pennsylvania, Trial Division Before
Judge Stanley L. Kubacki

Commonwealth v. Syre

July Sessions, 1981 - Nos. 2671, Hindering Apprehension or
Prosecution; 2672, Tampering with Witnesses and Informants;
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Post Trial Motions

February 23, 1982

Appearances: George Parry for the Commonwealth of Pennsyl-
vania F. Emmett Fitzpatrick, Jr., for Defendant,
Syre

EXCERPTS Re: District Attorney misconduct in the investi-
gation of official interference in jury deliber-
ations. pages 124, 130, 135 - 141, Det. Harris,
Cross

(Harris - Cross)

[124] ...

Q. So you did not talk with Mr. Capriotti, who was the
original source of this complaint, until you talked with
every other member of the jury panel; is that correct?

A. Yes.

Q. Was the order in which you talked to them decided by you
or by Mr. Parry or anybody else?

A. It was a joint decision.

Q. Did Mr. Parry participate in that decision?

A. Yes.

Q. Did Mr. Parry tell you to do it that way?

A. Yes. He is my supervisor, my boss.

Q. He is your boss and supervisor and he said talk to everybody else before you talk to Mr. Capriotti; is that right?

A. Yes.

Q. And when you went out to talk to everybody else, you prepared this list of questions —

MR. FITZPATRICK: I would like this list marked DPT-2.

(List of questions marked Defendant's Post Trial Motion Exhibit 2 for identification.)

* * *

[130] A. To my knowledge, the Judge had received copies of these.

Q. As far as you know, the Judge received copies of those two statements; is that correct?

A. At some time, yes.

MR. FITZPATRICK: May the record show that I doubt that because I didn't receive copies of those two statements.

Q. Did you ask these people, "Were there any problems or antagonisms between jurors and court personnel during the time you were sequestered, especially between Capriotti and court officers?"

Did you ask the jurors that question?

A. Yes.

Q. So that you went out on this investigation to find out whether or not Mr. Capriotti was causing any trouble with the other jurors; is that correct?

A. I just asked that question.

Q. You knew when you asked that question to these jurors that Capriotti was the man who had accused at least two of these jurors of impropriety and the reason for this investigation, didn't you?

A. Yes.

* * *

[135] ...

Q. Now, after you got through five of them you said there was a decision made to limit the scope of your inquiry; is that correct?

A. Yes.

Q. Who made that decision?

A. Partly me — well, it was my thought and when I made up that list, it was my belief that I should compose some questions because I knew that I couldn't get into the deliberations by the jurors, the actual deliberations after the Judge's charge and I wanted to make sure I didn't violate that area in my investigation.

Q. My question was: Who limited the scope to just people who had been talked to by the defense?

A. Well, Mr. Parry had said after — there was trouble contacting the jurors. Okay? And the first juror that I could contact was Miss Borasky and then Miss Ondrato. So, I set up appointments with them. And after I interviewed them, a decision was made, [136] look, maybe they didn't contact everybody. But contact all of the jurors to find out whether they have been contacted by the defense. If they haven't been contacted by the defense, just leave them alone.

Q. Were you told at any time, sir, that the Court had approved the scope of your inquiry to these jurors?

A. Approved what?

Q. The scope of your inquiry to these jurors.

MR. PARRY: Objection to the question. I don't understand it.

THE COURT: Do you understand the question?

THE WITNESS: No, sir.

Q. You don't understand the question?

A. No.

Q. Were you told at any point in time that any judicial official anywhere had approved the scope of your inquiry to these jurors?

A. No.

Q. And then you began to limit it just to jurors that had talked to the defense; is that correct?

A. Yes.

Q. Did you ask any of these five jurors whether [137] or not they had been told by any court officer that Mr. Syre was guilty or not guilty in any form?

A. Did I ask any of these first five people?

Q. Yes, sir, the first five people. Did you say to them have you been told by a court officer that Syre was guilty?

A. In Miss Borasky's statement on page 3, "Before you received the Judge's final instruction and before you went to deliberate, did anyone say anything to you that would have suggested guilt or innocence of Mr. Syre?"

And her answer was, "Nobody outside of the jury."

Q. Did you follow up that question or besides that question, did you say did you receive any indication from any court officer about the guilt or innocence of Mr. Syre?

Did you ask them that question or not, Detective Harris?

A. It's not in here. I didn't ask them.

Q. You were aware that this investigation was about a court officer saying something to two jurors; is that correct?

A. Yes, I was.

[138] And you never specifically said did a court officer say to you Syre is guilty or not guilty; is that right?

A. I apparently didn't ask it.

MR. FITZPATRICK: May I see those two statements that you have been referring to?

Would the Court give me just a moment to glance at them, sir?

THE COURT: Of course.

(Pause.)

Q. Did you take a statement from anybody else on the jury; you said you took four or five? You took a statement from Guarracino, one from Eskild and one from Capriotti.

A. Yes, from those two ladies, there.

Q. Anybody else besides those two ladies, Mrs. Borasky and Mrs. Ondrato?

A. No, sir.

Q. You took no written statements from anybody else?

A. No, sir; no written statements.

Q. The statement of Jean Ondrato, which is Commonwealth's Exhibit Post Trial 6, which I hand to you. [139] The second from the bottom of the page on that page, the question — would you read that question and read the answer?

A. The second question from the bottom?

Q. The second from the bottom, yes, sir.

A. "Did he express his views as to the guilt or innocence of Mr. Syre?"

Q. "He" is Mr. Capriotti, is that correct, sir?

A. Yes, sir.

Q. And the answer?

A. The answer:

"Answer: Yes. He said he was innocent."

And then she wrote, "I think he thought he was innocent."

Q. You wrote in there:

“Answer: Yes. He said he was innocent.”?

A. Yes, sir.

Q. And you asked Mrs. Ondrato to review that statement and to make any corrections; is that correct?

A. Yes, sir.

Q. And Mrs. Ondrato in her handwriting wrote what?

[140] A. “I think he thought he was innocent.”

Q. “I think he thought he was innocent.”?

A. Yes.

Q. And the answer that was given to you before was, “Yes. He said he was innocent.”?

A. Yes.

Q. Was that a transcription that you made in error, putting down what you thought it was or did Miss Ondrato change her mind at the time she went through the statement?

A. I don't know what was going through Mrs. Ondrato's mind. I recorded what I thought she said. I gave her the statement and I said, “You read this and if there is anything that has to be changed, you make the changes.”

Q. Was Mrs. Ondrato asked whether or not she heard a conversation between Mrs. Guarracino and court officer Wolf?

A. “Question: I have showed you a copy of a statement supposedly made by Mr. Capriotti; does that statement refresh your recollection in any way?”

Q. Before you get any further, “supposedly made.” [141] You mean at this time you had not even talked to Mr. Capriotti to find out whether or not he made the statement; is that right?

A. Right, that's right. The answer:

“Answer: I heard that Helen said, ‘I don’t know what your problem is, you heard the tapes.’ Barbara Guaracino, I think it was, told me that Helen did tell all of us collectively that we were not to discuss the case before deliberations. The other court officers also told us not to discuss the case before deliberations.”

Q. So that I can actually understand that answer, did Mrs. Ondrato indicate that she heard Helen say, “I don’t know what your problem is, you heard the tapes.”?

A. No, she did not say she heard it.

Q. What is the answer? Read it to us again.

A. “I heard that Helen said —”

Q. “I heard that Helen said —”?

A. “I heard that Helen said —”

* * *

APPENDIX N

Notes of Testimony in the Court of Common Pleas, First
Judicial District of Pennsylvania, Trial Division Before
Judge Stanley L. Kubacki

Commonwealth v. Syre

July Sessions, 1981 - Nos. 2671, Hindering Apprehension or
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Post Trial Motions

February 23, 1982

Appearances: George Parry for the Commonwealth of Pennsyl-
vania F. Emmett Fitzpatrick, Jr., for Defendant,
Syre

EXCERPTS Re: Judicial interference in inquiry into court
officer Helen Wolf's alleged interference with
jury. pages 109 - 110

RECROSS EXAMINATION

BY MR. FITZPATRICK:

Did the District Attorney's Office have occasion to interview
you about this matter, Mrs. Wolf?

A. Well, when you say an interview, Mr. Parry called me and
asked me if I had said anything to any of the jurors. And I

told him — and he explained to me that number fourteen juror had made a complaint. And I told him, well, whatever he complained to, I wasn't aware of this.

And he suggested that I take it up with the Judge, at which time I told him that we had a problem. Mr. Parry called and the Judge at that time told me not to discuss this with anyone, which I haven't.

Q. May I infer from that the District Attorney's Office never took a statement from you as to what you recall happening?

A. No, not that I know of.

Q. You never gave any statement in writing to anyone?

A. No.

[110] Q. Did you discuss it with the Judge?

A. No.

Q. Did the Judge ask you what happened in the cloister of the sequestered jury room about these conversations?

A. He asked me from the conversation Mr. Parry gave me, from what fourteen had already said, he asked me did this happen, from a brief outline and I said that it didn't happen and he said I was not to discuss this with anyone.

Q. From that point to today did you discuss it with anyone?

A. No, other than Mr. Parry this morning. He told me who was coming in and that was it.

Q. The district attorney's office sent to the Judge on January 12, I believe, a report with everyone's statement.

Did you have occasion to review that?

A. Yes.

Q. When did you review that?

A. It's been awhile.

MR. FITZPATRICK: Thank you. I have nothing further.

THE COURT: Mr. Parry, any

* * *

